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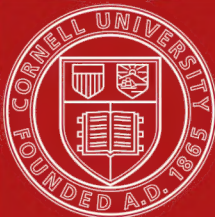
IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS



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A TREATISE
ON THE
LAW OF THE STATUTE OF FRAUDS,
AND
OF OTHER LIKE ENACTMENTS IN FORCE
IN THE
UNITED STATES OF AMERICA,
AND IN THE
BRITISH EMPIRE.

BY
HENRY REED,
OF THE PHILADELPHIA BAR.

IN THREE VOLUMES.

VOLUME I.

PHILADELPHIA:
KAY & BROTHER,
LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS
1884.

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Non tibi, cheu!
Sed carae memoriae tuae.

P R E F A C E.

THE accumulation of reported cases is going forward so rapidly, that the question of making them available to the busy practitioner is one which grows more serious every year. As long as the careful opinion of one man has any weight with another, cited decisions will be of effect in determining the fate of a litigation. The problem is then how to enable court and counsel, each in different ways closely pressed by work, to know what it is that other lawyers have done, and are doing in the same line of inquiry. Digests, themselves too numerous to be readily examined, and many of them most imperfectly constructed, are not enough. Still less so is the scientific treatise which, holding itself free from the entangling details of case-law, serves only to formulate leading doctrines. The need of the worker, both at the bar and in his library, has called into existence the modern text-book, which tries to combine, sometimes with great success, two almost contradictory purposes. For, if we put aside the exceptional instance of essays upon small subdivisions of the law, in which an exhaustive statement of the cases and a free discussion of theory are both possible, it is exceedingly difficult to give the searcher for precedents and the investigator of these wider considerations, without which mere decision has no solid basis, each the special material he seeks.

There seems to be but one answer to the problem, and this by making the arrangement of the collated adjudications such that the place in which a case is ranged shall form a

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point in the logical statement of the determining principle. If this can be successfully done, all that is left over of the actual decisions can be grouped as being so many applications of the general rule, whatever it may be.

The writer of the present work has thought his office to be neither that of a mere scribe, nor, on the other hand, that of a person speaking with authority; the nearest illustration, perhaps, is to suppose him one who is charging a jury of judges called to decide a question of law, or as junior counsel instructing his senior. He begins with the foundation of doctrine; he gives actual examples in order to make this quite clear; he gathers together the cases on each side, letting them generally speak for themselves; he criticizes them when they appear to be opposed to each other or to some governing principle, and he gives his own opinion only when he can make his reader's task easier by so doing. If the "lawless science of our law" is ever to be made single and homogeneous, if the "myriad code of precedent" is to be reduced to a system, it must be through some such preliminary process. The number of decisions, and the physical difficulty alone of using them, as we are in the habit of doing, must at last bring about the adoption of some plan radically different from that in use.

The contradictory, subtle, and yet practically important subject of the Statute of Frauds, gives as good a field for experiment as, perhaps, could be found; and if the present work has been written as it should be, it will show how and where the courts, when unfettered by authority, and under any circumstances the legislature, can formulate such rules, that the only real occupation for a judicial tribunal will be the ascertainment of facts in the particular controversy. The writer has no hesitation in saying, that if skill and care are employed, a statute can be drawn which would

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set at rest three-fourths of the questions of law connected with the Statute of Frauds; and as the trials of questions of fact will not be reported to be a later source of perplexity, the mass of precedents may be kept within a reasonable compass.

The scope of this book is the consideration of the leading statutes, except that of Wills, which require written evidence; when without such statute, oral proof would have been enough. Such, for example, are the Statutes of Frauds, Lord Tenterden's Acts, the laws which require contracts stipulating for a high rate of interest to be in writing, and those regulating the transfer of the title in vessels, etc. etc. A closely logical arrangement would have excluded all questions in which the nature of the subject matter is at issue. For the point whether a certain thing is realty or personalty, or a certain promise is a guaranty or an ordinary original promise, is not, except indirectly, one germane to a statute regulating evidence. Given land, or a guaranty, or a chattel, the question how far the agreement concerning it must be in writing, is strictly connected with the Statute of Frauds. But, were the whole field of jurisprudence properly divided and allotted, the writer upon the subject of land or guaranties or chattels would determine the preliminary point of the nature of the subject of the contract, and not a writer considering the law of evidence.

It is impossible, however, to put aside the ordinary arrangement, though the employment of it makes the lines of demarcation hard to draw. These in the end have to be arbitrarily fixed, and at the place where the writer may take farewell of his reader, his thought has been to give the latter such a brief of authorities as will help him to a good start with the next subject of his inquiry.

Cross-references have been given when possible, but in a voluminous manuscript not much in this way can be accom-

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plished. All those who use the book are asked therefore to put their main reliance upon the Index, where the scattered points will be brought together; for this same purpose the Table of Cases will be useful, because the student knowing of one decision on the question before him can often find others in the same passage.

The statements of fact are unusually full, though no slight pains have been taken in so grouping the cases that one such statement may answer for several citations. The ingenuity with which judges have employed the thinnest distinctions to evade a harsh application of the strict law makes the most seemingly inconsequent fact to be of weight; and as the present work, with the other treatises on the same subject, must for want of libraries answer in many instances as the only possible substitute for the reported cases, all facts bearing directly upon the issue of the decision have ordinarily been given.

It is not possible to prevent repetitions at times and redundancy of citation, because the labor required to reduce the bulk of the book in this respect would have been very great. It is thought, however, that the over-fulness will not on the whole diminish the utility of the treatise as would an error in the other direction.

The civil law, as it prevails modified by statute in Louisiana, in Scotland, and in Lower Canada, has been freely drawn upon because of its value in settling general principles.

Of the case-law of the American and British courts the writer has sought to supply a thorough digest.

The list of Statutes of Frauds given in an appendix has been prepared with a view to show the condition of the statute law in this matter in the past as well as at present; because without a knowledge of the statute in force at the time, it is often impossible to know what weight to give to a

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decision. This labor has been difficult, and it is not believed that the result is entirely free from error. Suggestions of mistake here, as at any part of the work, will, especially when accompanied like a plea in abatement with the correction of the error, be welcomed and acknowledged. The number of slips discovered in time and corrected make only the more certain the existence of many which have escaped notice. In preparing a manuscript it will happen that the abstract of a case and the report of it become separated, and in copying a wrong reference is attached to a statement. Nothing has been taken at second hand, but even gross blunders are not always to be avoided in the details of analysis and collation.

The writer has very sincere pleasure in saying what great indebtedness he is under to the gentlemen who have assisted him, Mr. W. Wilkins Carr, Mr. Ellis Ames Ballard, Mr. John M. Gest, Mr. Richard S. Hunter, and Mr. Chas. H. Bannard, whose special work will in each instance be indicated in the later volumes. Mr. J. Douglass Brown and Mr. Ballard have made themselves responsible for the accuracy of the citations; and the fidelity and patience which they have brought to their tedious task are gratefully recognized. At the same time are to be remembered the attentive services of the students in the writer's office and of the assistant librarians of the Law Association of Philadelphia, as well as the courtesy of the gentlemen in charge of the Law Libraries of New York and of Nassau (New Providence).

In the preface of a book of remarkable genius and learning, the one perhaps most conspicuous of late years for the magnitude of its erudite detail, the author telling how his long labors were coming to a close, says: "*J'ajouterai qu'à ce terme pour lequel je me suis astreint à de longues veilles je serais*

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arrivé moins tôt si une collaboration domestique aussi gracieuse que dévouée ne l'avait notablement avancé." And the quotation of these words may serve lastly to acknowledge an obligation for other faithful and most intelligent help not less important than any of the rest.

PHILADELPHIA, June, 1884.

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THE LAW OF THE STATUTE OF FRAUDS.

CHAPTER I.

THE HISTORY OF THE STATUTE OF FRAUDS AND ITS POLICY AND VALUE.

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| <p>§ 1. Authorship of the Statute.</p> <p>§ 2. 29 Car. II. c. 3, as in force in the British colonies.</p> <p>§ 3. English decisions as authority in America.</p> <p>§ 4. Federal Statute of Frauds.</p> <p>§ 5. Scottish law.</p> <p>§ 6. Lower Canada law.</p> <p>§ 7. Policy and value of the Statute of Frauds.</p> <p>§ 8. The Statute generally commended.</p> <p>§ 9. Exceptions to the Statute deplored.</p> | <p>§ 10. Qualified commendation.</p> <p>§ 11. Statute of Frauds condemned.</p> <p>§ 12. The Statute of Frauds and the common law rule excluding oral evidence to affect a writing.</p> <p>§ 13. Oral contract valid before the Statute of Frauds.</p> <p>§ 14. Oral evidence refused before the Statute of Frauds.</p> <p>§ 15. The common law rule of evidence as affected by the Statute of Frauds.</p> |
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§ 1. OWING to the infelicitous wording of the Statute of Frauds and to the stress which has been laid on the very terms of the act, as, for example, the distinction between “promise” and “agreement,” upon which the decision in *Wain v. Warlters* greatly hinged, it is an inquiry of interest to learn who wrote the statute and how far its language received proper revision. Lord Nottingham, in *Ash v. Abdy*, said: “And I said that I had some reason to know the meaning of this law, for it had its first rise from me who brought in the bill into the Lords’ House, though it afterwards received some additions and improvements from the judges and civilians.”(a)

(a) 3 Swanst. 664 (June 13, 1678). popular conjectures concerning the history of this celebrated statute refers its

Sir Geoffrey Gilbert, one of the commissioners of the Great Seal in the eleventh year of George I., said of the Statute of Frauds: "And in the making of this statute, which was contrived by Lord Chief Justice Hale and the most learned men of that time, they went upon the foot of the old Roman law." The remark was with special reference to the Wills clause; and in another report of the same case he said: "Sir Matthew Hale and Sir Leoline Jenkins, who prepared the statute, chose to take the plan from the Roman law." (b)

Francis North, speaking of his brother, Lord Guilford, says: "He had a great hand in the Statute of Frauds and Perjuries, of which Lord Nottingham said that every line was worth a subsidy. But at that time the Lord Chief Justice Hales had the pre-eminence, and was chief in fixing that law, although the urging part lay upon him, and I have reason to think it had the first spring from his lordship's motion; for I find in some notes of his and hints of amendment in the law every one of these points which were there taken care of." (c)

Lord Ellenborough, in *Wain v. Warlters*, says that the Statute of Frauds was drawn by Sir Matthew Hale, one of the greatest judges who ever sat in Westminster Hall. (d)

The Statute of Frauds was passed in the session of Parliament beginning February 15, 1676, and Sir Matthew Hale had died the previous Christmas (December 25, 1676, O. S.). (e) In a modern case it was said that the difference between

origin to Lord Nottingham. . . . There may have been some foundation for the tradition that Sir Matthew Hale and Sir Leoline Jenkins assisted in its preparation."

(b) *Whitchurch v. Whitchurch*, 1 Str. 621; *Gilb. Rep. in Eq. (Fol.)* 171.

(c) *Lives of the Norths*, i. 224 (Roscoe's ed.).-

(d) 5 East, 16. The reporter in a note adds that Lord Mansfield in *Wyndham v. Chetwynd* (1 Burr. 418), doubted Lord Hale's authorship of the Statute of Frauds to any greater extent than his having left loose notes which were unskilfully digested. Lord Mansfield

said: "It has been said that this act of 29 Car. II. c. 3, was drawn by Lord Chief Justice Hale, but this is scarce probable. It was not passed till after his death, and it was brought in in the common way and not upon any reference to the judges."

(e) *Burnet's Life of Hale*, 64, 69. The act received royal assent April 16, 1677. See, generally, as to the history of the Statute of Frauds, *Wynn's Life of Sir Leoline Jenkins*, i. p. 3; *Taylor on Evid.*, 5th ed., 870; 2 *Selw. N. P.* 727, and n., 7th Am. ed., 840; *Leigh N. P.*, p. *1015, nn.

the language of the fourth and seventeenth sections of the Statute of Frauds is accounted for by its various authorship.(f)

Before leaving this subject a reference to Sir Edward Sugden's proposed bill upon the law of written evidence may not be without interest. The principal points of it were that the writing should be signed at the foot thereof in the usual manner of subscribing regular agreements; that letters or correspondence should not be a compliance with the statute; that possession, part payment, and expenditures upon the land should not take the contract out of the Statute of Frauds; that an action for compensation should lie for the benefits of part performance, when the statute has been set up; and that there should be in this action certain rights of set-off; and that a deposit of deeds should not be a mortgage unless the agreement be in writing.(g)

§ 2. How far 29 Car. II. c. 3, has been in force in British colonies, then and since, is a point of some doubt. In an anonymous case, in 2 Peere Williams, it was said that: Where

(f) Bird v. Munroe, 66 Me. 343; the awkward language of the statute has often been commented on; see § 11.

(g) 2 Leg. Obs. London, 1831, 250. A bill was brought into Parliament this year (1883) by Mr. Reid and others, under which one claiming, though an oral contract, could require the other party to answer under oath as to the contract, and which provided that the agreement as confessed should be enforced, the bill was lost by four votes in a thin house. The Solicitor-General seems to have been not adverse to the bill. The Solicitor's Journal and the Law Times of London were strongly opposed to the bill as likely to be productive of perjury; the Law Times thinking that as a fact the plea of the Statute of Frauds was generally a meritorious one; the New Jersey Law Journal, on the other hand, urges with much force that the bill merely enables one of the parties to an oral contract to wring a confession against interest from the other party to the agreement. It is true

that divers defendants would doubtless perjure themselves to the injury of their morals, but the perjury does little hurt to any one but themselves, as, under the Statute of Frauds, the other party is without redress at any rate; if under the proposed bill the party examined can bind the other by his statement of the agreement, an indiscreet interrogation may hurt the party making it; but this risk he takes by putting the other upon oath, and indeed by suffering a nonsuit, or in any other way discontinuing his suit the plaintiff can put himself *in statu quo*. On the other hand, an honest confession by the person interrogated would, in some instances, lead to the discovery of the truth. For statutes of an analogous character in the United States see the chapter on Pleading and the statutes collected at the end of this work. See, as to the Reid bill, 75 L. T. 141, 204; 27 Solic. Jour. 661; 6 N. J. L. J. 226; 17 West. Jur. 449, defending the bill, and instancing the Iowa experience.

a new and uninhabited country is taken possession of by the English, the country becomes subject to the laws of England, but if after such country is inhabited an act of Parliament is made, not naming the foreign plantations, the latter are not bound. Hence, a provision of the Statute of Frauds requiring three witnesses to a will was held not to apply to Barbadoes.^(h) The Statute of Frauds was extended to the island of Grenada by a local statute.⁽ⁱ⁾ It is also in force in St. Kitts,^(j) and in Newfoundland.^(k) English statutes of the reign of Charles II. being subsequent to the settlement of Alabama, are not in force in that state.^(l) In Maryland the Statute of Frauds is of itself in force.^(m) In a case in McLean, it was said that in 1787, Kentucky not being a state, no Statute of Frauds passed by it could apply, and that an oral contract of exchange of land was then valid under the law of Virginia.⁽ⁿ⁾ In North Carolina, the statute was not in force till 1715, when parts of it were adopted.^(o)

Before March 21, 1772, the statute of 29 Car. II. c. 3, though enacted prior to Penn's charter and subsequent to the settlement of the colony, was held not to be in force in Pennsylvania, on the ground that of such prior statutes (except those that expressly referred to the colony) none applied which were made during the latter's existence as a British possession, and that at the time of the passage of this particular law, the authority of the British governor of New York extended in point of fact over Pennsylvania, being by virtue of the word *territories* used in the royal charter to him. Such seems to be the reason of the ruling in *Anonymous*, 1 Dall. 1. (See the

(h) P. 75; before the Privy Council, citing cases. See *Attorney-Gen. v. Stewart*, 2 Mer. 156, n.

(i) *Attorney-Gen. v. Stewart*, *supra*.

(j) *Beckett v. Harden*, 4 M. & S. 1; as to the British colonies in general, see 8 Petersd. Abr. (p. 114, n.); Burge, Conf. Laws, ii. 526-7, 699, 722-723, 787-9.

(k) *Fitzgerald v. Dawe*, Sel. Ca. Newf. 177.

(l) *Matthews v. Ansley*, 31 Ala. 22, citing *Carter v. Balfour*, 19 Ala. §29.

(m) *Sibley v. Williams*, 3 Gill & J. 62. See *Green v. Drummond*, 31 Md. 79. But was not applied to a will made shortly after, 29 Car. II. c. 3, because the knowledge of it had not been communicated to the colony; *Clayland v. Pearce*, 1 H. & McH. 29.

(n) *Carrington v. Brents*, 1 McLean, 176.

(o) *Smith v. Williams*, 1 Murp. 431.

note thereto questioning this position and putting the decision upon the broader basis of the inapplicability of such a statute to the circumstances of the colony. That this is the more correct view is confirmed by the fact that the statute was not re-enacted till 1772, and then only as to a small part of it.)^(p) One of the members of the Supreme Court of Utah has given it as his opinion that there would be no Statute of Frauds in that territory until the act as such should be passed; that as conquered land the law was the Mexican law, which was

(p) See Brack. Law Misc. p. 179; Sharsw. Law Lect. 226 *et seq.* 1 Sm. & R. Laws, 389 and note; as to the ability with which the Pennsylvania act, March 21, 1772, was drafted, see *Murphy v. Hubert*, 7 Pa. St. 423. See *Bell v. Andrews*, 4 Dall. 152. For an inaccurate statement of the adoption of the Statute of Frauds in Pennsylvania, see *White v. Knapp*, 47 Barb. 553. Speaking of *Murphy v. Hubert*, just cited, and referring to Chief Justice Gibson's remarks therein, Mr. Binney, in a pamphlet reviewing the decision of *Murphy v. Hubert*, Phila. 1848, p. 14, note, says:—

“The Chief Justice's liberal disposition to give praise to every one who deserves it, has, in this instance, given to some unknown person a degree of praise that is not merited by anybody. The first three sections of the 29 Car. II. c. 3, are but one enactment as the printed statute shows, and the consolidation is effected solely by destroying the distinction of paragraphs, and striking out after the words which except leases not exceeding the term of three years, these words, ‘thereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised’—and also the words ‘not being copyhold or customary interest.’

“This is readily shown by placing the

first section of the act of 1772, and the three paragraphs which constitute the first section of the statute, 29 Car. II. c. 3, in parallel columns.

“As a guard against perjury in sustaining a parol lease for three years, or under the clause in the second paragraph, the first section of the statute, omitted in the first section of the act, would have been useful, and ought to have been retained. The omission of copyhold tenure was a matter of course. The adoption of other sections of the Statute of Frauds, 29 Car. II. c. 3, and the omission of the rest required no other skill, in either adopting or rejecting, than such, as will be seen, an ordinary acquaintance with the law of Pennsylvania as it then stood must have shown to be expedient. This will appear by the subsequent remarks in the text.

“The history of the Act of Frauds of 1772, is not otherwise to be obtained than from the ‘Votes of Assembly,’ and this journal gives but a very imperfect account of the matter. The bill after being passed by the house in its present form, and presented to the governor for his approbation, appears to have been returned by him to the Assembly with amendments—6 Votes of Assembly, 358. The house did not concur, p. 367. In this last page it is called an amendment, and the governor in his reply intimated to the As-

tacitly replaced by the common law as suited to the wants of the new community.(q)

§ 3. The weight of American authority is in favor of regarding the English decisions made before the Revolution of 1776, as adopted with the adoption of the Statute of Frauds itself.(r) An adoption of a statute involves the interpretation then put upon it by courts of law.(s) In another case, speaking of the Statute of Frauds, the court said: It is a doctrine of the American courts, very generally accepted, that when a statute enacts a British statute, which has received in the mother country a fixed and established judicial interpretation, the legislature will be supposed to adopt the statute with the interpretation put upon it. The principle has been several times recognized in this court, with respect to statutes borrowed from other states.(t) And it has been said that English decisions on the statute would be followed, as the law was enacted with the knowledge of them.(u) Speaking of the phrase, "party to be charged," it was said in a Minnesota case, that the legislature of that state must have intended to use the phrase in the established sense.(v) The decisions in equity upon the Statute of Frauds were also adopted, and among the rest the doctrine of part performance.(w) Whether conclusive or not, the English decisions are certainly pertinent authority in America.(x)

sembly that he would waive it if the Assembly should adhere to the bill as it was sent to him. The bill being engrossed by order of the house was again presented to the governor and signed. An ineffectual search has been made in the secretary of state's office to ascertain what was the character of the amendment proposed by the governor, but it appears that there is no record of the governor's message remaining in the office."

(q) *First National Bank v. Kinner*, 1 Utah, 102, citing some authorities.

(r) *Allen v. Booker*, 2 Stew. 24; *Brock v. Cook*, 3 Porter, 466; see, also, *Cathcart v. Robinson*, 5 Pet. 280; Jones

v. Peterman, 3 S. & R. 543; *Farley v. Stokes*, 1 Pars. 429; *Pugh v. Good*, 3 W. & S. 58; *Reed v. Reed*, 12 Pa. St. 120.

(s) *Tomson v. Ward*, 1 N. H. 12.

(t) *Marqueze v. Caldwell*, 48 Miss. 31, citing many cases.

(u) *Yerby v. Grigsby*, 9 Leigh, 390.

(v) *Morin v. Martz*, 13 Minn. 192.

(w) *Cox v. Cox*, Peck (Tenn.), 457; *Downey v. Hotchkiss*, 2 Day, 225.

(x) *Meach v. Perry*, 1 Chip. 185; *Pinney v. Fellows*, 15 Vt. 539; *Wilson v. Ray*, 13 Ind. 6; *Vawter v. Griffin*, 40 Ind. 601; *Fagan v. Faulkner*, 5 Ark. 164.

But it has been held that English rulings need not be followed unless they convince (y)

§ 4. Before taking a hasty view of that part of the civil law as in force in English speaking countries which resembles the Statute of Frauds, it may be well to say that the Federal act of June 2, 1862, requiring contracts with officers of the United States Government to be in writing, has been decided to be a Statute of Frauds and generally binding as such.(z)

Federal
Statute of
Frauds.

§ 5. The Statute of Frauds having, as already seen, been drawn at least in part from the civil law (see § 1), the law of Scotland has decided interest by way of analogy. It confirms a view of the Statute of Frauds which is perhaps the wisest, that the latter, namely, should be limited in its policy to the transfer of land and to only such contracts as are of a comparatively unusual nature,(a) such, for example, as guaranties, personal assumptions by fiduciaries, promises in consideration of marriage, or to pay debts from which the promissor had been discharged. While the tendency of the Scotch law has from the first been in favor of requiring written evidence only in extraordinary transactions, there was at one time some hesitation in the matter. Thus it was said that innominate contracts regarding heritage, or even movables, especially such as are of an unusual character, cannot be constituted verbally; where there are mutual obligations flowing naturally from the contract, oral evidence is safe; but otherwise the danger of mistake on the part of the witnesses is very great.(b) In a case in Macpherson, Lord Neaves

Scottish
law.

(y) *Grant v. Craigmiles*, 1 Bibb, 209; *Patton v. McClure*, Mart. & Yerg. 337, citing cases; *Garner v. Stubblefield*, 5 Tex. 558.

contract which deviates in any degree from the common right ought to be in writing."

(z) *Clark v. The United States*, 95 U. S. 541; *Danolds v. U. S.*, 5 Ct. of Cl. 71, citing *Lindsay's Case*, 4 Ct. of Cl. 359; see *infra* the special sections which relate to this statute; see *Jones v. United States*, 11 Ct. of Cl. 740.

(b) *Edmonston v. Edmonston*, Sess. Cas. 23 D. 1001; 33 Scotch Jur. 514, citing *Erskine iv. 2, 20*. A nominate contract (see *Bouvier Law Dict.* and *Paterson's Compendium*) is a special kind of contract, the terms and effect of which are established by law, and which is always the same; when, therefore, the parties state that they

(a) In *Mallet v. Bateman* L. R. 1 C. P. 169; *Pollock*, C. B., said that "every

said:(c) “The statements in some of the law books . . . are unsatisfactory. ‘Innominate contracts,’ it has been said, ‘especially such as are of an unusual character, cannot be proved by witnesses.’ This appears to me a very indistinct statement of the law. A contract of so extraordinary or unusual nature may only be provable by writ or oath, but I do not think that innominate contracts can be proved only in that way. A plain contract like this, even though it were held to belong to the class of innominate contracts—which I doubt—may, in my opinion, be proved by parol. I do not think the case of Edmonston (*Edmonston v. Edmonston*) militates against this view. The contract there alleged was of a most extraordinary nature, and the decision was clearly sound. The agreement was to compromise and make a payment to the plaintiff in a suit for breach of promise of marriage brought by her against J. F., who was then living with the defendant, and who was (?) his relative.” In another case it was said that the test as to the admissibility of parol evidence does not depend upon the fine distinction between nominate and innominate contracts, but upon whether the contract is usual or so unusual, as to give rise to stipulations which would not naturally flow from the general nature of the agreement; many innominate contracts can be proved by parol.(d)

The peculiarity of the Scotch system in the eyes of a common lawyer is that the judges in each case decide whether the particular contract is unusual or not, requiring or not requiring written evidence to establish it, instead of the legislature

made a nominate contract, describing it by its generic name, the law applies the certain rights and liabilities which belong to that contract. An innominate contract is any agreement which the parties choose to make and which may vary in every case.

(c) *Thomson v. Fraser*, 7 Macph. 41 (Ct. of Sess.); see cases cited by counsel.

(d) *Forbes v. Caird*, 14 Scotch Law Reporter, 672 (Ct. of Sess. First Div.). Oral evidence was admitted to show

that an innkeeper allowed an omnibus line free stabling on condition that the line would start from the inn. And for an example of an unusual stipulation required to be proved by writing or oath, *Taylor v. Forbes*, Sess. Cas. 4 D. 19, was cited. For a view of the Scotch law requiring written evidence of a guaranty, and as to contract of service, see *infra*. See, generally, as to Scotch law on the subject, *Burge on Confl. of Laws*, ii. 517–8; and consult *Bell Com.*; see 19 and 20 Vict., c. 60, § 60.

settling in advance for the guidance of the community what agreements must be put in writing and what need not. There are several such cases to be found elsewhere in this work under appropriate heads; the following example will show the principle: Thus, an agreement by a lawyer to do business gratuitously, expecting to get his costs from the other side, being contrary to the ordinary rule in agencies, must be proved by a writing or the oath of the party.^(e) The rule is otherwise where the person is not acting in a professional capacity.^(f) Contracts of a commercial nature are provable by parol in Scotland.^(g) Though this rule did not at one time extend to such contracts, if one of its features was a guaranty. Thus it was said: "With regard to other commercial contracts you do not allow them to be proved by witnesses, but they may be proved in any other habile manner; for instance, by the oath of the party. If a debtor says, I paid that debt, and offers to prove the payment by witnesses, you would not sustain that mode of proof, but you would allow a reference to oath, and thus wherever writing is not *de essentia* of the contract the obligation may be proved *scripto vel juramento*."^(h) But *semble* that now, however, a guaranty *in re mercatoria* can be proved by oral evidence;⁽ⁱ⁾ and that if the original contract is of a commercial nature the guaranty may be proved by parol.^(j) A gratuitous promise, even for less than £100 Scotch, though once held provable orally, is no longer so.^(k)

§ 6. The civil law as in force in Lower Canada, following the same principle as the Scotch jurisprudence, permits oral proof of business transactions. Thus, the sale of a wagon by a hotel-keeper to a "cultivateur et commerçant" is a commercial act, and can be orally proved.^(l)

(e) Taylor v. Forbes, Sess. Cas. 24 D. D. 875; 16 Scotch Jur. 376; S. C., *sub nom.* Grant v. Johnston, 7 D. 390; 17

(f) Moscrip v. O'Hara, Sess. Cases, Scotch Jur. 141.

4th ser. vol. 8, p. 37.

(g) Hamilton v. Struthers, 31 Scotch Jur. 44.

(j) Burge, Surety, p. 37.

(k) Campbell v. McLauchlan, 29 Morr. Dict. 12288.

(h) Sinclair v. Sinclair, Bell Fol. Cas. 142.

(l) Vandal v. Grenier, 6 Low. Can. Reports, 475.

(i) Johnston v. Grant, Sess. Cas. 6

So the employment by a railroad of an engineer.^(m) But the payment of a debt in judgment must be shown by writing, though the original obligation was of a commercial character.⁽ⁿ⁾ The 54th section of the law known as the "Ordonnance Du Moulins" is to the same effect as the 17th section of the Statute of Frauds.^(o)

§ 7. It is an instructive fact, that now, after two centuries of experience of the law, there is to be found among those best fitted to judge, an irreconcilable difference of opinion as to the utility of the Statute of Frauds. On the one hand, the strict letter of the act is commended, exceptions and modifications to it are frowned upon, and its extension by legislation approved; on the other, it has been said to be of more harm than good, that the exceptions to it are all that make it tolerable, and that it should be limited to a small class of gratuitous promises and to protect the title to land; between these extremes is the opinion that the statute is good, but the exceptions to it are good also, and that as interpreted by equity judges, but only as so interpreted, is it a valuable law. The tendency of modern legislation has certainly been to extend the principle of the Statute of Frauds to several new classes of subjects, as may be seen in another part of this work. If the expression of an individual opinion may be permitted, the present writer suggests that an examination of the adjudications contained in this book would show that a large proportion of such immense litigation could in the future cases be done away with by careful legislation.

§ 8. The Statute of Frauds, to return to our immediate sub-

(m) *Legge v. Laurentian*, R. W., 24 Low. Can. Jur. 99 (Q. B.); the proof offered was of a promise by the plaintiff to take his pay in the bonds of the company at a certain figure.

(n) *Miller v. Kemp*, 14 Low. Can. Jur. 76.

(o) *Fry v. Richelieu Co.*, 9 Low. Can. Rep. 411. Generally as to the civil law in its resemblance to the Statute of Frauds, see *Burge on Conf. of Laws*, ii. 517-8, 652-722, 775-785; *Greenl. on*

Evid. (14th ed.), I. § 262, p. 308, n. 1. See *Spence, Eq. Jur.* I. 22, 33. See *Gibb. Dec. and Fall*, c. xlv. As to proof by interrogation or oath, etc., see the chapter on Pleading; as to commercial contracts, see that on Chattels; and as to the history of the Statute of Frauds in Lower Canada, see those on Chattels and on Pleading. See *Morgan v. Yarbrough*, 5 La. Ann. 317, for some examples of contracts good in Louisiana by parol.

ject, has received no little commendation.^(p) Thus "My Lord Chancellor" (Cowper) "said that he had always been tender in laying open that wise and just provision Parliament had made" (*i. e.*, the Statute of Frauds).^(q) In *Higginson v. Clowes*, Lord Alvanley (Pepper Arden) was said by counsel, Sir Samuel Romilly and Mr. Heald, to have been a judge much attached to the Statute of Frauds.^(r) In *Proctor v. Jones*, Chief Justice Best said that the Statutes of Frauds and of Limitations were both so much objected to at the time when they were passed that the judges appeared anxious to get them off the statute-book, but in later times they have become desirous to give them their full effect, "and added I think the Statute of Frauds is a good and wholesome

The statute generally commended.

- (p) *Simon v. Metiver*, Wm. Black. Comst. 264; *Adams v. Rockwell*, 16 600; *Chater v. Beckett*, 7 T. R. 204; *Wend.* 311; *Woods v. Farmare*, 10 *Howe v. Palmer*, 3 B. & Ald. 323; *Hu-* Watts, 203, 207; *Wither's App.* 14 S. *bert v. Turner*, 4 Scott, N. R. 505; & R. 192; *Cravener v. Bowser*, 4 Pa. *Chaplin v. Rogers*, 1 East, 194; *Alder-* St. 259; *Moore v. Small*, 19 Pa. St. 465; *son v. Maddison*, 7 Q. B. D. 174; 5 *McKowen v. McDonald*, 43 Pa. St. 443; *Exch. D.* 294; 8 App. Cas.; see Table of *Schafer v. The Bank*, 59 Pa. St. 144; *Cases for other references; Lindsay v.* *Gheen's Estate*, 7 W. N. C. 66 (S. C. *Lynch*, 2 Sch. & Lef. 1; *Palmer v.* Pa.); *Hall v. Hall*, 2 McCord, Ch. 273; *White*, Wallis, Rep. (Lyne), 22; *But-* *Newnan v. Carroll*, 3 Yerg. 26; *Erwin v.* *Butler v. Church*, 18 Grant. 192; 16 Id. *Waggoman, Cooke (Tenn.)*, 403; *Row-* 205; *Poucher v. Treahey*, 37 U. C. Q. B. *ton v. Rowton*, 1 Hen. & Mun. 98; *Henderson v. Hudson*, 1 Munf. 515; *Baldey v. Parker*, 2 B. & C. 40; *Jackson v. Cutright*, 5 Munf. 311; *Paine* *Baker v. Hollobaugh*, 15 Ark. 322; *v. Graves*, 5 Leigh, 565; *Cutler v. Hinton*, 6 Rand. 509; *Lester v. Lester*, 28 *Peabody v. Harvey*, 4 Conn. 122; *Comes* *Grattan*, 737; *Campbell v. Thomas*, 42 *v. Lamson*, 16 Conn. 246; *North v. For-* *Wis.* 441; see *Will. Trust.* p. 43; *rest*, 15 Conn. 409; *Crockett v. Green*, *Evans's Poth. Obl. ii.* 191-3; *Wh. & Tud.* *3 Del. Ch.* 472; *Wood v. Thornly*, 58 *L. C. Eq. (4th Am. ed.)* 1062; *Whart.* *Ill.* 466; *Mahana v. Blunt*, 20 Iowa, *Evid.* § 853; 15 Alb. L. J. 240; *Steph.* *144; Gilpatrick v. Sayward*, 5 Me. 465; *N. P. pt. ii.* 1954; *Tayl. Evid. (5th ed.)* *Phillips v. Hunnewell*, 4 Greenl. 380; *870; Leigh, N. P. p.* *1015 nn. *Semmes v. Worthington*, 38 Md. 317; *Wingate v. Dail*, 2 H. & J. 76; *Worley* *v. Walling*, 1 Harr. & J. 209; *Baker* *v. Wainwright*, 36 Md. 347; *Alderton* *v. Buchoz*, 3 Mich. 326; *Bréwer v. Wil-* *son*, 17 N. J. Eq. 184; *Jackson (d. Lloyd)* *v. Titus*, 2 Johns. 432; *Hall v. Shultz*, 4 Johns. 243; *Clark v. Tucker*, 2 Sandf. 165; *Getman v. Getman*, 1 Barb. Ch. 504, 513; *Shindler v. Houston*, 1
- (q) *Bawdes v. Amherst*, Prec. Ch. 402; see, also, Lord Loughborough in *Mortimer v. Orchard*, 2 Ves. Jr. 243, the bent of his mind being strongly in favor of the statute. Lord Nottingham had said that the statute was worth a subsidy.
- (r) 15 Ves. 521; 1 Ves. & B. 524.

statute.”(s) Where six persons were present when a verbal contract was made, and three say one thing and another three say differently, the value of the statute is shown, said the court in another instance.(t) In a Virginia case, it was said that such promises as that by a parent to devise land in consideration of support are to be narrowly scrutinized, and the constant attempts to set them up by parol vindicate the Statute of Frauds.(u) In a Pennsylvania case between litigants of the same name, as in that just cited, an alleged agreement to the same effect was said to be “another of that illegitimate or suspected brood that is continually being hatched out of the exceptions to the Statute of Frauds, and which gives rise and permanence to family feuds.”(v) Chancellor Zabriskie said: “This salutary statute should not be lightly dispensed with, and the uncertainty and unreliability of most of the evidence in this case show the wisdom of that statute.”(w) It has been argued that the value of the statute has been shown by its extension to promises to pay outlawed debts.(x) In a decision in the King’s Bench of Upper Canada, it was remarked as singular, that considering its age the Statute of Frauds is not better known among laymen.(y) Especial provisions of the Statute of Frauds have been picked out for approbation. Thus, it has been called the “Magna Charta of real property.”(z) Even the “chattels” clause of the Statute of Frauds (the 17th section), the subject

(s) 1 C. & P. 534; see *Kirby v. Johnson*, 22 Mo. 356.

(t) *Ellison v. Wiseheart*, 29 Ind. 34.

(u) *Cox v. Cox*, 26 Gratt. 311.

(v) *Cox v. Cox*, 26 Pa. St. 381.

(w) *Eyre v. Eyre*, 19 N. J. Eq. 102.

(x) *Hetfield v. Dow*, 3 Dutch. 446; and Lord Kenyon regretted that the acceptance of a guaranty was not required to be in writing. *Johnson v. Collings*, 1 East, 103. In *Albertson v. Ashton*, 102 Ill. 56, the court said: Owing to the natural repugnance of all right-thinking men to permit the success of unfair dealing, there are many cases found that manifestly have strained the language and meaning of the

statute. Hence, we find cases that have gone to the very verge, if not beyond reasonable and fair construction, or rather facts have been strained to hold that they constitute a compliance with its requirements. The statute was regarded as necessary at the time of its adoption, and we have no doubt, notwithstanding it may have worked hardships, its operation has been salutary, and the General Assembly has not relaxed its provisions, but, on the contrary, has increased its rigor.

(y) *Poucher v. Treahey*, 37 U. C. Q. B. 370.

(z) *Jackson v. Cary*, 16 Johns. 302.

of so much criticism (see *infra*), has been judicially approved. (a) The change in modern law permitting interested persons to testify has been regarded as a reason for upholding the Statutes of Frauds and of Limitations. (b) Judge Paxson has said that "The practical working of the recent act of Assembly . . . admonishes us that it would be unwise to relax any of the rules of law in cases" affected by these enactments. It has been thought that the Statute of Frauds should be construed in a liberal spirit. (c) It was said by Chief Baron Pollock, that it is not proper to strictly construe the Statute of Frauds, though it is in derogation of the common law, for acts of Parliament should be interpreted according to their intention. (d) The statute should also be closely adhered to, and the exceptions to it not extended. (e) The Supreme Court of Indiana has held that: "So long as we pretend to be governed by the Statute of Frauds and the Statute of Limitations, some practical and common sense effect should be given to them. The provisions of the Statute of Frauds, as to what shall be essential to pass a title, are familiar. The closer they can be adhered to consistently with controlling judicial authority, the better. Otherwise, the acts become a snare rather than a protection." (f) The Supreme Court of Tennessee said at an early day, that it had come to the determination some years previously to execute the Statute of Frauds as nearly within the letter as may be. (g)

(a) *Cooper v. Elston*, 7 T. R. 16 (per Grose, J.).

(b) *McKinney v. Snyder*, 78 Pa. St. 499; *Haverly v. Mercur*, 78 Pa. St. 257; 1 W. N. Cas. 348; *Capehart v. Hale*, 6 W. Va. 550; *Smith v. Jones*, 66 Ga. 342; *Brown v. Lord*, 7 Or. 309.

(c) *North v. Forest*, 15 Conn. 404; *Schafer v. Farmers' Bank*, 59 Pa. St. 145; *Jones v. Peterman*, 3 S. & R. 547.

(d) *Dobson v. Collis*, 1 H. & N. 81; 25 L. J. Ex. 267.

(e) *Rucker v. Cammeyer*, 1 Esp. 105; *Woollam v. Hearn*, 7 Ves. Jr. 211; *Graham v. Musson*, 7 Scott, 776; 5 Bingh. N.R. 606; *Carter v. Toussaint*, 5 B. & Ald. 858; *Darnell v. Tratt*, 2 C. & P. 82; *Bedilian v. Seaton*, 3 Wall.

Jr. 279; *Butler v. Thompson*, 92 U. S. 412; 11 Blatch. C. C. 535; *Abell v. Calderwood*, 4 Cal. 90; *Packer v. Benton*, 35 Conn. 349; *Wilson v. Bevans*, 58 Ill. 234; *Suman et al. v. Springgate*, 67 Ind. 122-3; *Alderton v. Buchoz*, 3 Mich. 326; *Semmes v. Worthington*, 38 Md. 327; *Galway v. Shields*, 1 Mo. App. 549; 66 Mo. 313; *Delventhal v. Jones*, 53 Mo. 462; *Hall v. Newcomb*, 7 Hill, 418, Aff'g S. C. 3 Hill, 233; *Allen's Estate*, 1 W. & S. 385; *Moore v. Small*, 19 Pa. St. 465; *Henderson v. Hudson*, 1 Munf. 515; *Jackson v. Cutright*, 5 Munf. 311; *Heth v. Woolridge*, 6 Rand. 607.

(f) *Ball v. Cox*, 7 Ind. 459.

(g) *Campbell v. Taul*, 3 Yerg. 558.

And the tendency of the courts of equity is not to enlarge the exceptions to the statute.(h)

§ 9. The modern decisions, while recognizing to what an extent the earlier adjudications, especially in equity, have infringed upon the enactments of the Statute of Frauds, generally, though not universally, deplore this result.(i) Lord Kenyon observed that these exceptions bred a multiplicity of suits.(j) The beneficial effects of the statute have been thought to have been marred by them.(k) Lord Eldon said that he would go no further, as the cases had nearly cancelled the Statute.(l) In an early case in New York it was said that "The Court of Chancery, with a view of preventing frauds, has gone far by its decisions to render this act a dead letter, but we are not sitting in that court, which would probably have done as well not to depart from the literal provisions of the law, which are too explicit to be misunderstood, and too salutary not to be strictly enforced."(m) The clause relating to contracts not to be performed within a year has, perhaps, suffered the most.(n) In a New York decision Judge Daly denied that there was any hostility to the Statute on the part of the courts, but said that the difficulty was in the awkward language thereof.(o) The doctrine of part-

(h) Webster v. Gray, 37 Mich. 39.

(i) Salmon Falls Co. v. Goddard, 14 How. (U. S.) 454; Allen v. Booker, 2 Stew. 21; Brock v. Cook, 3 Porter (Ala.), 469; Keatts v. Rector, 1 Ark. 416; Peabody v. Harvey, 4 Conn. 122; Johnston v. Maconnell, 3 Bibb, 1; Shepherd v. Shepherd, 1 Md. Ch. 244; Boyd v. Stone, 11 Mass. 346; Wallace v. Brown, 2 Stockt. 308; Tufts v. Tufts, 3 W. & Min. 476; Hood v. Bowman, 1 Freem. Ch. (Miss.) 292; Phillips v. Thompson, 1 Johns. Ch. 131; Niven v. Belknap, 2 Johns. 574; German v. Machin, 6 Paige Ch. 292; Gangwer v. Fry, 17 Pa. St. 495; Brown v. Lord, 7 Or. 309; Withers's Appeal, 14 S. & R. 192; Moore v. Small, 19 Pa. St. 461; Blakeslee v. Blakeslee, 22 Pa. St. 243; Church of Advent v. Farrow, 7 Rich. Eq. 382; Hall v. Hall,

2 McCord Ch. 272; Patton v. M'Clure, Martin & Yerg. 333; Townsend v. Sharp, 2 Overt. 192; Anthony v. Leftwich, 3 Rand. 55; Macey v. Childress, 2 Tenn. Ch. 450; Chater v. Beckett, 7 T. R. 204; Alderson v. Maddison, 7 Q. B. D. 174; 5 Exch. D. 294; 8 App. C. (see Table of Cases); see Story, Eq. Jur. (12th ed.) § 765 et seq. See 14 Can. Law Journ. 74.

(j) Chater v. Beckett, 7 T. R. 204.

(k) Rogers v. Rogers, 6 Jones, 303.

(l) Cooth v. Jackson, 6 Ves. Jr. 16; see, also, Boardman v. Mostyn, id. 469.

(m) (Jackson d.) Nellis v. Dysling, 2 Cai. 201.

(n) Purcell v. Miner, 4 Wall. 517; see the chapter on that subject.

(o) Passaic Co. v. Hoffman, 3 Daly, 502.

performance has been especially deplored.^(p) Lord Redesdale, in *Lindsay v. Lynch*, cites the phrase, "Improve gentlemen out of their estates."^(q) In a recent Illinois case the court said: "The Statute of Frauds is pleaded, and it was designed to protect owners of land from claims of this sort, which might give occasion for false testimony. The statute has been evaded more than once by judicial decrees, but never has it been disregarded, except in cases where the proof of the contract is clear and full, its terms complied with, the purchase-money paid, possession taken, and valuable improvements made upon the land contracted to be sold. This is going quite far enough, and it is more conducive to the best interests and welfare of society that the party complaining should be remitted to his remedy at law."^(r)

§ 10. The commendation of the Statute of Frauds is sometimes in a qualified form, as that it is salutary in the main; or that it must be enforced, though occasionally^(s) harsh.^(t) In an early Missouri case it was said that the Statute of Frauds was good where sudden changes in the value of land are frequent, or where perjury prevails, as was the case in England in 1676.^(u) The acceptance of the statute as a wise law is often upon the understanding that the doctrine of part-performance goes with it. Sir James Mansfield said that the benefits of the statute are much more apparent to those who are conversant with the practice of chancery than to those who know only common-law practice.^(v) In a Nebraska case the judge, delivering the opinion of the court, said: For my own part, as an individual member of

Qualified
commendation.

(p) *Adams v. McMillan*, 7 Port. (Ala.) 80; *Sands v. Thompson*, 43 Ind. 21; *Johnston v. Macconnell*, 3 Bibb, 1; *Stoddert v. Bowie*, 5 Md. 43; *Wingate v. Dail*, 2 H. & J. 76; *Peckham v. Barker*, 8 R. I. 23; *Hall v. Hall*, 2 McCord Ch. 273; *Macey v. Childress*, 2 Tenn. Ch. 450. See chapter on Part Performance.

(q) 2 Sch. & Lef. 1.

(r) *Gosse v. Jones*, 73 Ill. 510.

(s) *Rochleau v. Bidwell*, Dra. Rep. U. C. 366.

(t) *Hite v. Wells*, 17 Ill. 91; see *Vaughn v. De Wandler*, 63 How. Pr. 381.

(u) *Bean v. Valle*, 2 Mo. 111 (Teste Titus Oates).

(v) *Anstey v. Marden*, 1 B. & P. N. R. 131; see *Attorney-Gen. v. Day*, 1 Ves. Sr. 220, for a rationale of the exceptions to the Statute of Frauds; see *Wall. Trust*, 43; *Dankel v. Balliet*, 8 W. N. Ca. 387.

the court, I think that while the Statute of Frauds is of priceless value as a general rule of law, yet, that as long as human nature remains as it is, there will constantly arise cases in which it will be impossible for the courts to administer justice between the parties, if held to the iron rule of the statute, and in which the statute itself will have been, by the crafty and unscrupulous, converted into an instrument of fraud upon the careless and improvident.(w)

§ 11. The Statute of Frauds has in some instances met with entire reprobation; it has been said to cause more fraud than it prevented.(x) The omission from the Statute of Frauds of Pennsylvania of the "Land" clause of the 4th section of 29 Car. II. has been thought to have had no ill results, or none at least commensurate with those which flow from the great litigation which that clause has always given rise to elsewhere.(y) The misguided application of the statute has been acknowledged to have created more fraud than it prevented;(z) so a too strict construction.(a) Chief Justice Scroggs, who achieved his reputation rather, however, as a criminal jurist than as a civil one, said that oral promises before the Statute of Frauds were "regarded as good and valid as they are yet amongst honest men."(b) The amount of money which it has cost to interpret the statute has often been guessed at—a million sterling, for example.(c) Chancellor Cooper, in the Tennessee case just cited, said that the law of Statute of Frauds, as relating to guaranties, was more subtle than Fearne on Contingent Remainders.(d) The awkward lan-

(w) Hanlon v. Wilson, 10 Neb. 141; see Lester v. Lester, 28 Gratt. 737.

(x) Wilson v. Watts, 9 Md. 460; Lam-born v. Watson, 6 Harr. & John. 255, per Buchanan, C. J.; Allwine v. Garberich, 2 Pears. 28; see Will. Trust. 43.

(y) See Rawle's Smith on Contr. (p. 118), p. *47 n. 1; 1 Sm. L. C. (5th Am. ed.) 389. On the other hand, see, however, Jack v. Morrison, 48 Pa. St. 113; Sidwell v. Evans, 1 P. & Watts, 385.

(z) Morgan v. Worthington, 38 L. T., N. S. 445.

(a) Kilborn v. Forrester, Drap. U. C. 346.

(b) Gilmore v. Shuter, 2 Lev. 227 (see Table of Cases).

(c) See 2 Kent Com. 513, n. (d); Johnson v. Watson, 1 Kelly, 350; Downs v. Ross, 23 Wend. 270 (Bronson, J., saying that if the view he took was not adopted the statute would never be explained); Macey v. Childress, 2 Tenn. Ch. 450 (the chancellor adding that the remedy was in legislation); see Leigh N. P. p. *1015, n.

(d) Macey v. Childress, 2 Tenn. Ch. 450.

guage of the statute has been adverted to; it is a mere patchwork.(e) In *Passaic Man. Co. v. Hoffman*, Judge Daly cited Lord Campbell as advocating the abolition of the Statute of Frauds, and was himself so far of the same opinion as that the statute should not extend to contracts which are really for work and labor.(f) That there is a constant liability to new points is noticed in an Indiana case, which calls attention to the fact that the question in *Eastwood v. Kenyon*(g) arose for the first time in 1840.(h) The "Chattels" clause of the Statute of Frauds has been the one the most criticized.(i) It has been said that this provision is universally disregarded by Manchester traders.(j) The wisdom of the 17th section has been questioned by the Scotch lawyers also.(k) There is no such rule in Scotland, France, or Holland.(l)

§ 12. There is an important distinction between the exclusion of oral evidence because of the Statute of Frauds and its exclusion at common law; the reason of the latter rule is, that a writing entered into by the contracting parties must be presumed to contain the entire agreement, and all oral stipulations, though proved to be true, are supposed to have been waived, and to be merged in the writing. Under the Statute of Frauds, on the contrary, the oral evidence is rejected because it is the policy of that law to regard it as untrustworthy *per se*. The difference between the two rules is best shown by the case of a written contract, on its face manifestly incomplete; here if the subject-matter is within the Statute of

The Statute of Frauds and the common law rule excluding oral evidence to affect a writing.

(e) *Ellett v. Britton*, 10 Tex. 209; see *Passaic Co. v. Hoffman*, 3 Daly, 502; see *Chance on Powers*, No. 869; see *Bird v. Munroe*, 66 Me. 343. The expression "allowed to be good" in § 17 of 29 Car. II. c. 3, is criticized by *Bramwell, B.*, in *Noble v. Ward*, L. R. 1 Exch. 121; see *Fonbl. Eq. I.* 198.

(f) *Passaic Man. Co. v. Hoffman*, 3 Daly, 505.

(g) 11 A. & E. 438.

(h) *Colter v. Frese*, 45 Ind. 104, that is to say, in England; it had been de-

cided in Massachusetts in 1821, see *Colt v. Root*, 17 Mass. 229.

(i) *Marvin v. Wallis*, 6 E. & B. 733; S. C., sub. nom., *Marvin v. Wallace*, 25 L. J. Q. B. 369; *Nicholson v. Bower*, 1 E. & E. 172; 28 L. J. Q. B. 97; *Hart v. Bush*, E. B. & E. 496; 27 L. J. Q. B. 272; *Ames v. Ginty*, 16 Can. L. J. 36; *Pinkham v. Mattox*, 53 N. H. 602; see *Law Rev. (Eng.)* vol. xxii. p. 175, 419 (A. D. 1855).

(j) *Shively v. Black*, 45 Pa. St. 347.

(k) *Bell on Contr. of Sales*, 63.

(l) *Kent Com.* 12th ed., p. 494 (n. a).

Frauds, no oral evidence can be received to supply the defects of the writing; whereas the common law rule is no bar to such admission.(m)

§ 13. An oral contract before the Statute of Frauds was, as a general rule, enforceable.(n) A sale of personalty, which under statute is required to be in writing and recorded, is valid if before the act.(o) In a Louisiana case it was held that a promise made before the Statute of Frauds of that state, and admitted without objection, was good.(p) As will be seen in a moment, there are some reported cases in chancery before 29 Car. II. c. 3, in which a writing was required; it may be well, therefore, to give examples of oral contracts enforced at that date. In one case an oral purchase of a house for £290 was decreed in favor of the vendee, who had paid 20s. in hand, and had tendered the rest at the day.(q) An oral contract made before the Statute of Frauds can be sued on after; that is to say, the act is prospective and not retrospective.(r) Retroactive operation cannot be given to an act making the possession of certain chattels, without the possession of a written title thereto, *prima facie*

(m) *Hutchins v. Lee*, 1 Atk. 447; *Simpson v. Kimberlin*, 12 Kan. 584; *Wesley v. Thomas*, 6 H. & J. 26; *Lamb v. Crafts*, 12 Metc. 355; *Woollam v. Hearn*, 7 Ves. Jr. 211; *Fenley v. Stewart*, 5 Sandf. 105; *Sale v. Darragh*, 2 Hilton, 196; *Erwin v. Saunders*, 1 Cow. 250; *McConnell v. Brillhart*, 17 Ill. 360; *Smith v. Williams*, 1 Murph. 431-2; *Ratcliffe v. Allison*, 3 Rand. 539; see Greenl. Evid. (14th ed.) I. § 262, p. 308, n. 1; *Stark Ev.* (10th Am. ed.) p. *644, n.; 13 Leg. Obs. pp. 8 and 77; 2 Centr. Law Jour. p. 654 (an article copied from the Irish Law T.).

(n) *Mobile Ins. Co. v. McMillan*, 31 Ala. 719; *Allen v. Beal*, 3 A. K. Marsh. 555; *Nelson v. Clay*, 5 Litt. (Ky.) 153-4; *Ball v. Ball*, 2 Bibb, 66; *Duvall v. Guthrie*, 3 Bibb, 532; *Searcey v. Morgan*, 4 Bibb, 96; *Barbour v. Whitlock*, 4 Mon. 192; *Fisher v. Cockerill*,

5 Mon. 137; *Wall v. Scales*, 1 Dev. Eq. 472; *Rabassa v. Orleans Nav. Co.*, 5 La. 460; *McDonald v. Stewart*, 18 La. Ann. 91; *Williams v. Lewis*, 5 Leigh, 694; *Thornton v. Corbin*, 3 Call. 389.

(o) *Knoulton v. Redenbaugh*, 40 Ia. 114.

(p) *Taylor v. Smith*, 15 La. Ann. 416.

(q) *Voll v. Smith*, 3 Rep. in Ch. (Fol.) 16 (21 Car. II.); see *Hunt v. Cheeseman*, Toth. (10 Jac. 1) subd. 48, p. 65 (Holb. ed.).

(r) *Ash v. Abdy*, 3 Swanst. 664; *Gilmore v. Shuter*, 2 Lev. 227; *T. Jones*, 108; S. C., sub. nom., *Gillmore v. Shooter*, 2 Mod. 310; S. C. sub. nom., *Helmore v. Shuter*, 2 Show. 16; *Dunn v. Tharp*, 4 Ired. Eq. 7; *Lingenfelter v. Ritchey*, 58 Pa. St. 487; *Ballentine v. White*, 77 Pa. St. 20; see *Maffitt v. Rynd*, 69 Pa. St. 387; see *Wade on Retrospective Laws*, § 45, § 233.

evidence of theft; this would be an *ex post facto* law under the Constitution of the United States.^(s) And in Louisiana it was held that the application of the Statute of Frauds to oral contracts, valid under the law prevailing when the contract was made, would cause the act to impair the obligation of these contracts, and on that ground be a violation of the Federal Constitution.^(t) A parol contract for conveyance of lands made prior to the passage of the Statute of Frauds is enforceable, especially when acquiesced in for forty years; when it averred that the contract was made in the period between certain dates, the court assumed the true date to be the middle one between the others, which put the contract before the local Statute of Frauds.^(u) In an early Maryland case, a question arose as to a will under the Statute of Frauds, and the court said: "The matter of law insisted on the special verdict being only on the act of Parliament relating to frauds and perjuries of 29 Charles II., for that it seemed to the court, that the will was made within two years and a half after the making of the said statute, and before publication or notice thereof in this province, and before the making of the act of Assembly, directing the manner of pleading the laws of England in the Commissary's Court, and also in the infancy of the country, when evidences were harder to come by than now, the court were induced by these motives to overrule the argument on the said statute." The will was dated August 20, 1679, and proved by two witnesses August 30, 1680.^(v) Lord Tenterden's act, 9 Geo. IV. c. 14, which did not go into effect till some months after it was passed, has been held not to be affected by the rule laid down in *Gilmore v. Shuter*, and to apply to a suit brought after it went into effect on promises made before.^(w) Where a law (Maine Statutes, 1848, c. 52, R. S. c. 111, § 1) provided that no "action shall be brought and maintained" upon a special contract to pay a debt from which

(s) *Espy v. The State*, 32 Tex. 375.

(v) *Clayland v. Pearce*, 1 H. & McHen.

(t) *McDonald v. Stewart*, 18 La. Ann. 29.

91.

(w) *Towler v. Chatterton*, 6 Bing.

(u) *Bell v. Breckenridge*, 1 A. K. Marsh, 564.

264, citing two unreported rulings on cases brought before the act, but not tried till after.

the promissor has been discharged by bankruptcy; it was held that this was a good defence in a suit instituted after the passage of the law, but based on a verbal promise made before its passage.(x) A verbal contract relating to land, made before the Statute of Frauds, is valid; the action would be assumpsit, and would be barred by a statute of limitations, affecting the action of assumpsit.(y) A provision in a written contract requiring written proof of certain matters, has not the binding effect of a statute of Frauds; and the original written contract may itself be waived by subsequent parol.(z) An oral contract by a relative to pay for services, while requiring clear proof, does not require the strictness of the Statute of Frauds.(a).

§ 14. The principles of which the Statute of Frauds are an embodiment are those of a policy older than that enactment. In *Smith v. Surman* it was said that(b) “the fourth section applies to those verbal provisions or agreements which, before the passing of the Statute, were probably, in most instances, reduced into writing, though not necessarily so.” And, as has been said, the principle of the act is as old as Constantine.(c) In Pennsylvania, before the adoption of any part of the fourth section of the Statute of Frauds, it was said that evidence of an oral guaranty must be “clear and explicit; that there should be no room to suspect mistake, misapprehension, or any unfairness in the transaction.”(d) Before the Statute of Frauds, however, courts of equity were, upon general principles, very cautious of giving relief upon parol contracts for lands, unless confessed by the answer, or in part performed.(e) In an early California case the court said that, even before the Statute of Frauds was in force, “we are unable to perceive how, under any system of laws, a verbal understanding be-

(x) *Kingley v. Cousins*, 47 Me. 91.

(c) *Tufts v. Tufts*, 3 W. & Min. 476;

(y) *Allen v. Beal*, 3 A. K. Marsh. 555.

1 Spence Eq. Jur. 160.

(z) *Ford v. United States*, 17 Ct. of Cl.

(d) *Petriken v. Baldy*, 7 W. & S. 430 (A. D. 1844).

75, citing *Hawkins v. U. S.*, 96 U. S. S. C. 689.

(e) *Tilton v. Tilton*, 9 N. H. 389; citing *Fonb. Eq.*, Book I. ch. 3, § 8; 2

(a) *Miller's Appeal*, 39 Leg. Int. 479.

Story's Eq. 55; *Sugd. Vend.* 86.

(b) 4 M. & R. 463.

tween an agent, unauthorized by any written paper, and a vendee, who neither takes possession nor pays any part of the purchase-money, can be enforced if repudiated by the vendor, and even if such a contract could be holden valid, it would seem to have been the duty of the vendee, under the circumstances, to have immediately notified the vendor of his purchase. The possession of the property was in the vendor, and before the vendee could claim the property as his by a valid purchase, he should have taken possession either by actual seizure under the contract, or by title-paper duly executed.”(f) In decreeing specific performance the chancellor, from the earliest times, has exercised a discretion as to the amount and nature of the evidence necessary to satisfy his conscience.(g) And the unsatisfactory character of oral evidence is often the subject of judicial comment.(h) The following are some chancery cases before 29 Car. II.: Thus a bill for the specific performance of a verbal promise to give the right of ingress and egress in a garden for the purpose of drying clothes was dismissed for triviality. (Anno. 20 and 21 Eliz.⁴)(i) A case in which a bill laying a promise to assure land for 10s. in hand, and £2100 at days, was demurred to, and the demurrer was allowed, because but a preparation for action upon case, is cited by Sugden, V. & P. (p. 152), as one showing that without part-performance oral contracts, even before the Statute of Frauds, were not enforced in chancery.(j) An oral contract in consideration of marriage, that the wife should have the separate use of certain property of her own, was held to be done away with by the marriage, and could not be enforced; that to be valid it should have been by an assurance good at law.(k)

(f) *Harris v. Brown*, 1 Cal. 100.(g) *Underwood v. Hitchcox*, 1 Ves. Sr. 279; *Robeson v. Hornbaker*, 2 Green Ch. 63; *Abbott v. L’Hommedieu*, 10 W. Va. 677; see *Smith v. Howell*, 3 Stockt. 349; written evidence of an express trust was required, though the trustee failed to answer.(h) *Barrow v. Greenough*, 9 Ves. Jr. 154; *Mercer v. Stark*, 1 Sm. & M. Ch. 487; *Higgs v. Wilson*, 3 Metc. (Ky.),338; *Shakespeare v. Markham*, 72 N. Y. 400; *Paulinson v. Van Iderstine*, 1 N. J. L. J. 235; *Jones v. Knaus*, 31 N. J. Eq. 609.(i) *Hamby v. Northage*, Carey, 109.(j) *William v. Nevill*, Toth. 135 (Holb. ed.), subd. 50, p. 72; as to the slight value of Tothill’s Reports, see Marvin’s Leg. Bib., Wallace’s Reporters. (k) *Suffolk (Earl of) v. Greenville*, 3 Rep. in Ch. (Fol.), 17 Car. I. 50.

A demurrer to a bill for specific performance was allowed, because the contract was not under hand and seal, and only 20s. paid as an earnest.^(l) Before the Statute of Frauds it has also been held that chancery will not execute an oral agreement, unless it had been executed in part, or under hand and seal.^(m) And oral promise as to a child's marriage portion (*semble*) not good, even before 29 Car. II., by custom of London.⁽ⁿ⁾ When sued for the debt of another a defendant could at common law wage his law.^(o) In an early North Carolina case the court said: "It is not easy to arrive at a certain conclusion one way or the other, as to the practice in England before the Statute of Frauds and Perjuries. There are authorities both ways, and the more ancient ones are in favor of the jurisdiction. In 1467 it is said by a judge: 'That if I promise to build you a house, and do not perform my promise, you have your subpœna;' and in 1505, Fineux, chief justice, speaking of the different remedies given in the courts for the non-performance of contracts, observes, 'that if a man bargain with another that he shall have his land for 10*l.*, and that he will make him an estate therein by such a day, and he does not make the estate, an action upon the case lies; but in that he shall only recover damages; but by subpœna the chancellor may compel him to execute the estate, or imprison him.' On principle, too, it would seem that such a jurisdiction might have been correctly exercised. Before the Statute of Frauds and Perjuries, in England, the only contracts and dispositions of property, real or personal, which were necessary to be put in writing, were of property lying in grant, as rights and future interests, and that species of real property to which the name of incorporeal hereditaments applies. These were always authenticated by a deed; and the Statute of 32 Hen. VIII., ch. i., which gave to the owners of laud a partial power of disposing of their estates by will, directed such will to be declared in

(*l*) *Simmons v. Cornelius*, 1 Rep. in Ch. (Fol.), 15 Car. II. 128.

(*m*) *Normanby (Marquis of) v. Devonshire (Duke of)*, Freem. Ch. 216.

(*n*) *Hall v. Lumley, Toth.*, subd. 44, p. 48 (Holb. ed.).

(*o*) *Fish v. Richardson*, Yel v. 55; citing *Davis v. Rayner*, 2 Keb. 758; *Russel v. Haddock*, 1 Lev. 788; *Scott v. Stevens*, Sid. 89.

writing; some contracts were also required by customary laws to be in writing; but, as a general rule, no writing was necessary; for even estates in land might be completely transferred by symbolical delivery in the presence of neighbors, however useful the precaution might be of recording the transaction by a charter of feoffment. It seems, indeed, that courts of equity were cautious in former times, as they ought always to be, of relieving bare parol agreements for lands, where the agreement has not been signed by parties, nor any money paid. And as this branch of their jurisdiction is governed in a peculiar degree by sound discretion, cases may be found where they have refused relief for the want of a part-performance.”(p) An oral contract, made before the Statute of Frauds in Kentucky, was not ordered to be specifically enforced after a lapse of several years.(q) In a case reported in 1 Dallas a curious difference, on common-law principles and in the absence of any provision of the Statute of Frauds in Pennsylvania upon the subject, was made between the oral and written evidence of a guaranty. It was held, that where there is doubt the jury must say whether the defendant was alone credited, or whether he was looked to collaterally; in the former case the party interested may testify to his book; in the latter case there must be a writing, or the testimony of a disinterested witness. This on the theory that the interested testimony is only competent to prove the delivery, and is not allowed to charge any other person than him to whom the delivery is made. In this case the delivery was made to the party answered for, and the defendants were also charged in the book; the defendants were customers of the plaintiffs, and acknowledged at the trial that some, but not all of the articles, were for their use. Upon a charge as above the jury found for the defendants.(r)

§ 15. Where the subject matter of a written contract is within the Statute of Frauds, the latter furnishes an additional reason for refusing the admission of oral evidence to

(p) *Dark v. Bagley*, 3 Murph. 33; on Contracts; Law Lib., vol. 67, p. 73; citing *Tothill*; and 1 Madd. 287, and Story's Eq. Jur. § 753.

Sugd. on Vend. See *Smith v. Williams*, (q) *Smith v. Carney*, 1 Litt. 297.

1 Murph. 431; see Will. Eq. Jur.; Batt. (r) *Poultney v. Ross*, 1 Dall. 239, C P. Phila.

contradict or vary the writing.^(s) The common law of exclusion and that of the Statute of Frauds are equally stringent, and the latter is no harsher than the former.^(t) The rule at common law may indeed be stricter, since (as has been said) even performance will not let in oral evidence to supply the defect in a written agreement, though, had there been no writing, the evidence would have been admissible.^(u) Under the common law alone oral evidence varying the writing is inadmissible.^(v) As has been said, oral evidence to supplement a manifestly imperfect writing, while admissible at common law, is inadmissible when the subject matter of the contract is within the Statute of Frauds.^(w) In a case not under the Statute of Frauds it was said that it might well be doubted whether the best rule as to admission of parol evidence to affect a writing should not in all cases be regulated by the policy and reason of the statute, though in some exceptional classes of cases parol evidence had been held admissible to establish in cases outside of the statute an oral contract different from the writing.^(x) In a case in New York the court even went so far as to admit oral evidence to show that the written promise was in reality a guaranty with a view to establishing that the writing was imperfect under the Statute of Frauds for not stating a consideration ^(y) Oral evidence may be, as has been said, inadmissible under both the common-law rule and the Statute of Frauds.^(z) Where one signs a contract of suretyship which

^(s) *Williamson v. Hall*, 1 Ohio St. 192; *Robinson v. Frost*, 14 Barb. 543; *Harnor v. Groves*, 15 C. B. 674 (Dictum per Maule, J.); *Lazear v. Nat. Uni. Bank*, 52 Md. 120.

^(t) *Clapp v. Lawton*, 31 Conn. 100; *Jackson v. Barnes*, 5 Phila. 33, per Hare, J. See under the civil law in Lower Canada, *Fry v. Richelieu Co.*, 9 Low. Can. Rep. 411.

^(u) *Binstead v. Coleman*, Bunb. 65.

^(v) *Northrop v. Speary*, 1 Day, 23; *Riddick v. Glennon*, 6 Ir. Jur. (cases) p. 39; see *Treatises on Evidence, passim*.

^(w) *Glass v. Hulbert*, 102 Mass. 24; *Musselman v. Stoner*, 31 Pa. St. 270; *Moulding v. Prussing*, 70 Ill. 151.

^(x) *M'Culloch v. Girard*, 4 Wash. C. C. 293.

^(y) *Clarke v. Richardson*, 4 E. D. Sm. 174; see *Sackett v. Palmer*, 25 Barb. 179.

^(z) *Gordon (Lord) v. Hertford (Marquis of)*, 2 Madd. 121; *Kirk v. Bromley Union*, 2 Phil. Ch. 648; *Preston v. Merceau*, 2 W. Bl. 1250; *Parteriche v. Powlet*, 2 Atk. 383; *Hart v. Clark*, 5 Mart. 614; *First Nat. Bank v. Bennett*, 33 Mich. 523.

purports to be intended to be executed by other persons also, he is not liable till the others have signed, and under the Statute of Frauds no oral evidence can be adduced to rebut this implication.(a) A verbal agreement by the sureties on an officer's bond that on his re-election after his first term had expired the old bond should continue, is within the Statute of Frauds.(b) The oral evidence may be admissible in spite of both rules: thus when it does not contradict the writing, which is an insufficient memorandum under the Statute of Frauds, but there has been delivery and acceptance of the chattels, oral evidence is admissible to show that the sale was on credit.(c) So an oral contract not within the land clause of the statute, and made after the deed of the land sold was prepared, is admissible in evidence.(d) Where one partner executed a note in the partnership name, and the defence was that it was not such a note but really given for the private debt of the partner executing it, a parol promise to pay it made by the defendants, the other partners, is admissible to prove it to be what it purports, and the Statute of Frauds (guaranty clause) does not make the evidence incompetent, the latter going only to the execution of the note.(e) So in Louisiana, if a memorandum of lease is so defective as to be of no efficacy of itself, parol evidence can be taken in connection with the writing to make out the agreement, no law requiring the latter to be in writing.(f) As ✓ to the difficult and important question how far oral evidence is admissible to show that a memorandum under the Statute of Frauds is incorrect, a question which is affected both by the Statute of Frauds and the common-law prohibition, see the chapters on the Memorandum.

(a) *Johnston v. Kimball*, 39 Mich. 187; see *First Nat. Bank v. Bennett*, *supra*.

(b) *German Vet. Soc. v. Finzer*, 1 Kent. Law Rep. 57.

(c) *Lockett v. Nicklin*, 2 Exch. 92.

(d) *Remington v. Palmer*, 62 N. Y. 34.

(e) *McGill v. Dowdle*, 33 Ark. 314.

(f) *Rabassa v. Orleans Nav. Co.*, 5 La. 460.

CHAPTER II.

LEX FORI AND LEX LOCI CONTRACTUS.

§ 16. The general rule.

§ 17. *Lex loci contractus*.§ 18. *Lex loci*, when held to be the only test.

§ 19. Presumption or proof of foreign law.

§ 20. *Lex rei sitæ*.

§ 21. Contract made in one place to be performed in another.

§ 22. Contract made abroad to be performed in the forum.

§ 23. Contract made in the forum to be performed abroad.

§ 24. The *lex fori*.

§ 16. THERE is scarcely a feature of the law of the Statute of Frauds of the same importance that is more uncertain than is that which concerns the respective application to a given case of the Statute of Frauds of the forum, or that of the *locus contractus*. Every shade of opinion has been expressed upon the subject, and it is impossible to say, with any approach to positiveness, whether the statutes of both localities apply, or, if either, which. The text-writers are disposed, and, with some reason, to say that, first, the *lex fori* must rule, because the statute is one relating to evidence, but that, secondly, the *lex loci* must also apply, because the statute is one with a definite policy, which goes to the essence of the agreement in many ways, and which may be considered as incorporated into the contract by implication.^(a) By such a test a contract to be enforceable must be in writing, if within the Statute of Frauds of either the place where it was made, or of that where it is put in suit; and of this opinion is the present writer. Before taking the special cases bearing upon this question it may be well to quote some definition of the law which regulates such problems as that before us.

From the case of *Trimbey v. Vignier* the following state-

(a) See Whart. Conf. of Laws, § 689; applies; but see Redfield's Note, contra, see Story, Conf. of Laws; see Story, n. 3; see Rorer, Inter-State Law, 60. 262 (a), implying that the *lex loci* only

ment of the question before us is taken. The Court of Common Pleas of England said: "The rule which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this: that the interpretation of the contracts must be governed by the law of the country where the contract was made (*lex loci contractus*), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought (*in ordinandis judiciis, loci consuetudo, ubi agitur*). See *Huberi Prælectiones Civilis Juris*, tit. 3; *De Conflictu Legum*, sect. 7. This distinction has been clearly laid down and adopted in the late case of *De le Vega v. Vianna* (1 B. & Adol. 284); see, also, the case of the *British Linen Company v. Drummond* (10 B. & C. 908), where the different authorities are brought together." (b)

In *Huber v. Steiner*, Tindal, C. J., said: (c) The distinction between that part of the law of the foreign country where a personal contract is made, which is adopted, and that which

(b) *Trimbey v. Vignier*, 1 Bing. N. C. 159; the court adding: The question, therefore, is, whether the law of *France*, by which the endorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case, it must be adopted by our courts; in the latter, it may be altogether disregarded, and the suit commenced in the name of the present plaintiff.

And we think the *French* law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the endorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed, the difference in the consequences that would follow, if the plaintiff sues in his own name, or is

compelled to use the name of the former endorser as the plaintiff byprocuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences we think the law of *France* falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing.

We therefore think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here.

(c) 2 Scott, 326; see *British Linen Co. v. Drummond*, 10 B. & C. 908, a case as to the application of the Statute or Limitations for learned citations upon the present question.

is not adopted by our English courts of law, is well known and established, viz., that as much of the law as affects the rights and merits of the contract, all that relates "*ad litis decisionem*" is adopted from the foreign country; so much of the law as affects the remedy only, all that relates "*ad litis ordinationem*" is taken from the "*lex fori*" of that country where the action is brought. And that in the interpretation of this rule the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the *lex loci contractus*, is evident from many authorities. In Huber's treatise, *De Conflictu Legum*, § 7, he says, "*Ratio hæc est; quod præscriptio* (where observe the term '*præscriptio*' is used generally for limitation) *et executio non pertinet ad valorem contractus, sed ad tempus et modum actionis instituendæ.*"

The *lex loci contractus* determines the validity, obligatory force, and interpretation of contracts, the *lex fori* the remedy thereon.(d)

In a case at the Rolls, Lord Langdale said: "As to contracts merely personal I apprehend it to be the general rule that questions relating to the validity and interpretation of a contract are to be governed by the law of the country where the contract was made, and that if a remedy for non-performance is sought for in another country, the mode of suing and the time within which the action must be brought are to be governed by the law of the country in which the action is to be brought." And he held that the interest on a contract of acceptance in England of a foreign bill is to be regulated by the law of England, though *semble* the interest as against a foreign endorser or drawer of the same bill must be by the foreign law.(e)

§ 17. Upon the question of *lex fori* and *lex loci*, Shaw, C. J., has said that the *lex loci* determines the nature and legal quality of the act done, whether it constitutes a contract, the nature and validity, obligation and legal effect of such contract, and furnishes the rule of construc-

Lex loci contractus.

(d) Gibson v. Sublett, 1 Kent, L. R. & (e) Cooper v. Waldegrave (Earl of), J. 730, Supr. Ct. Ky.; Labatt v. Smith, 3 Beav. 284. id. 422, Ct. App. Ky.

tion and interpretation.(f) Lord Mackenzie has said that the interpretation of personal contracts and their validity, as regards form and solemnity, are governed by the law of the country where they are made *locus contractus regit actum*.(g) In a Louisiana case it was said that "an instrument as to its form and the formalities attending its execution must be tested by the laws of the place where it is made; but the laws and usages of the place where the obligation of which it is the evidence is to be *fulfilled*, must regulate the performance."(h) In an early Vermont case the Supreme Court said that as to the requisitions of a valid contract, the mode of authentication, the form and ceremonies required and, in general, as to everything which is necessary to perfect or consummate the contract, the *lex loci contractus* governs, the court excepting from their statement the *lex rei sitæ*, as to land. Where a contract is made in one state to be performed in another, the law of the latter applies to matters of performance, and, to some extent, to those of validity, as a usury law for example. This is on the ground that the parties so intended.(i) In Maryland, it has been held that the character of a contract is to be ascertained by the *lex loci*, unless *contra bonos mores*; the law of the place of contract governing as to the essence of the rights acquired, and the obligations created by it.(j) The *lex loci contractus*, whether exclusively or not, applies according to good authority.(k) Lord Ellenborough held that an agreement invalid for want of a stamp under the law of the country where it was made, could not be sued on in England.(l) In Louisiana it has been held that where a parol sale, void under the law of that state, took place elsewhere, proof that, by the

(f) *Carnegie v. Morrison*, 2 Metc. (Mass.) 398. See Story's Conf. Law, § 260, citing Boullenois and other civil law writers to the effect that the *lex loci contractus* determines the writing, etc., and quoting several definitions of the rule. See Whart. Conf. of Laws, § 639.

(g) Roman Law, p. 191.

(h) *Vidal v. Thompson*, 11 Mart. 24.

(i) *Pickering v. Fisk*, 6 Vt. 107.

(j) *Baltimore and Ohio R. R. v. Glenn*, 28 Md. 321; see *Trasher v. Everhart*, 3 G. & Johns, 245.

(k) *Anderson v. May*, 10 Heisk. 89; *Scudder v. Union Nat. Bank*, 1 Otto, 411 (*semble*); Story's Conf. L. § 260, and n. 4; § 262; § 262, (a); § 631; 3 Burge, Conf. L. 760.

(l) *Clegg v. Levy*, 3 Camp. 166.

law of the latter locality, the parol sale is good is necessary, if the party is to recover under the sale.(m)

§ 18. There is authority for the extreme position that it is the *lex loci* alone which needs to be complied with. Thus, a contract made in New Orleans, and good by Louisiana law, as, for example, a memorandum of guaranty which does not express the consideration, may be sued upon in Arkansas.(n) So where, according to Louisiana law, sales required to be proved by writing may be proved by parol if the parties are willing, and in the case of a sale in Louisiana, in a suit in Mississippi, the courts of the latter state will follow the Louisiana rule.(o) So an oral gift of slaves made in South Carolina, and there valid, was upheld in Tennessee, though the law of the latter state required a writing.(p) In Alabama it was held that if the Statute of Frauds of the state of the donor of personal property is satisfied, it is of no consequence if that of the *forum* is not; and this, though the donees from before the time of the gift until date are and were living in the state where suit was brought.(q) Judge Story seemed to have thought, though not without doubt, that the Statute of Frauds of the forum should not be applied to contracts made and intended to be fulfilled abroad.(r) In *Gibson v. Holland*,(s) Judge Willes said of *Leroux v. Brown*,(t) that the reason why it is hard to understand is that it enlarges the scope of the Statute of Frauds, and makes it apply outside of England.(u) Where the defendants, who resided at Toronto, sold by their agent oil

Lex loci
when held
to be the
only test.

- (m) *Gantt v. Gantt*, 6 La. Ann. 674. *Denny v. Williams*, 5 Allen, 1. See, contra, *Hunt v. Jones*, 12 R. I. 266; see 9 Am. L. Rev. 436.
- (n) *Ringgold v. Newkirk*, 3 Ark. 108; see Story's Conf. Law, § 262a and n. 3; 3 Burge, Conf. Law, 760. See what is said in Whart. Conf. Laws, § 684, and cases there cited.
- (o) *Fox v. Matthews*, 33 Miss. 444, citing cases.
- (p) *Eaves v. Gillespie*, 1 Swan, 130.
- (q) *Turner v. Fenner*, 19 Ala. 360 (a case of a will).
- (r) *Low v. Andrews*, 1 Story, 42; *Van Reimsdyk v. Kane*, 1 Gallis. 638, 642; see, also, *Dacosta v. Davis* 4 Zab. 319;
- (s) L. R. 1 C. P. 1; 13 L. T., N. S. Rep. 293.
- (t) 12 C. B. 801.
- (u) *Leroux v. Brown* is doubted in Maxwell on Statutes for the same reason; the author cites *Williams v. Wheeler*, 8 C. B. N. S. 299; *Gibson v. Holland*, and *Story Conf. L. p. 285*, observing on *Acebal v. Levy*, 10 Bing. 382.

to the plaintiff at Chicago, and it was agreed that the oil should be delivered to a certain carrier at Toronto, and the price paid at the latter place, and the contract was sued upon in Canada, it was held that the contract was an Illinois one, and could be enforced in Canada, notwithstanding the Canadian Statute of Frauds.^(v) In Maryland it was held that, not only would a deed made by a corporation of Virginia be interpreted in Maryland by the Virginia law, but that a contract invalid in Maryland would be there enforced, if valid by the law of Virginia where it was made.^(w) A contract for a parol

(v) *Green v. Lewis*, 26 U. C. Q. B. 625. *Leroux v. Brown* being cited and explained as laying down the rule that contracts within the 4th section, though valid by the *lex loci*, are bound by the *lex fori*. But that under the 17th section, the contracts, if valid by the *lex loci*, are not affected by *lex fori*, because the 17th goes to the substance of the contract, but the 4th does not. Citing also *P. & O. Steam. Co. v. Shand*, 12 L. T. Rep. N. S. 809; *Gibson v. Holland*, 13 L. T. N. S. Rep. 293.

In *Marié v. Garrison* (N. Y. Super. C.), Report of Theodore W. Dwight, Referee, p. 29, this point was strongly urged, and it was argued that, if a contract is valid or invalid under the "chattels" clause of the Statute of Frauds of the *locus contractus*, it is valid or invalid in any forum, the "chattels" clause saying that an oral contract, relating to wares, etc., shall not "be allowed to be good," while the "land" clause merely says that "no action shall be brought;" it is deduced from this, that, while the "land" clause may relate to the procedure, the "chattels" clause goes to the substance of the contract. That at any rate the "chattels" clause cannot be supposed to have as its aim the nullification of foreign contracts, and that if the object of the law had been to prevent the enforcement of these latter within the state, the

suitable language for such a purpose would have been, that "no action should be brought." On p. 78 of his report, the referee adopts the converse proposition, and holds that a contract unenforceable under the "land" clause of the *lex loci contractus* may be enforced in a forum where the law is not the same. In brief, this theory may be stated in these propositions: First, that the clause of a Statute of Frauds which declares that a contract shall not "be allowed to be good," makes such an agreement void, and only applies to contracts made in the state where such law is in force, which we will call state A. Secondly, that the clause of a Statute of Frauds which declares that "no action shall be brought" on a contract, applies only to contracts sued upon in the state where such law is in force, which we will call state B. And, therefore, if a contract of the kind described, either in Proposition I. or Proposition II., was made in state B., it may be enforced in state A. But that if made in state A., neither contract can be enforced in state B. But as to the doubtful value of any doctrine drawn from this distinction, see chap. on Chattels and that on Validity, etc.

(w) *Baltimore and Ohio R. R. v. Glenn*, 28 Md. 321. In Maryland, it was held that assumpsit will not lie on an instrument with a seal, though

arbitration and award made and to be performed in Tennessee, if valid there, can be sued on in Georgia; it did not appear whether such award was valid in Georgia or not.(x) In a Michigan case, the court refused to apply the Statute of Frauds of that state when the contract was made on the St. Clair River, and it was not proved whether the contract was in that part of the river which lay within the state of Michigan.(y)

§ 19. The Statute of Frauds of another state or country must be proved; it will not be judicially taken notice of.(z) In a Wisconsin case the law of the place of contract was assumed to be the same as that of the forum, though in the particular instance the fact was otherwise, the oral contract being valid by the former and invalid by the latter.(a) The courts of Missouri will not presume that a promise to accept a draft, which, by the statute of that state, must be in writing, is valid in Texas by parol; they will not even assume that the common law prevails there, the original law there having been Spanish.(b)

§ 20. The *lex rei sitæ*, in the case of immovables, furnishes a simple standard, and the contract as to land must, as a rule, conform to the law of the place where the land is, no matter where the contract itself be made. Thus authority to consent to the sale of land in Illinois must be in writing, and that the authority was

only a scrawl, and though in Virginia, where the contract was made, the seal was not good; *Trasher v. Everhart*, 3 G. & Johns. 245; see *Pickering v. Fisk*, 6 Vt. 107.

(x) *Green v. East Tennessee R. R.*, 37 Ga. 457.

(y) *Cummings v. Stone*, 13 Mich. 72.

(z) *Houghtaling v. Ball*, 19 Mo. 86; *Butters v. Glass*, 31 U. C. Q. B. 385 (even though the contract was made in Lower Canada); *Forward v. Harris*, 30 Barb. 342; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 19; 9 Hun, 348; *Kling v. Fries*, 33 Mich. 277; *Connor v. Trawick*, 37 Ala. 295; see *Siegel v. Robinson*, 56 Pa. St. 20, *infra*. In an

Alabama court it was presumed that the common law prevailed in Mississippi. *Danner v. Brewer*, 69 Alabama, 203.

(a) *Birdsey v. Butterfield*, 34 Wis. 65; see *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 19, where the court suggested the point, but did not decide it. In *Burrell v. Root*, 40 N. Y. (1 Hand), 496, the law of Iowa was assumed to be the same as that of New York, but the point was substantially a common law one, namely, that a seal sufficiently proved the consideration of a writing, and the mere application of this to a writing under the Statute of Frauds would scarcely make a difference.

(b) *Flato v. Mulhall*, 72 Mo. 523.

given in Kentucky, where it would have been good by parol, is immaterial;(c) and as a converse case, a contract of partnership made in Louisiana, the law of which state requires a witness for this purpose, may be proved by parol in California, where the partnership was to be carried on, though the subject matter of the partnership business was land.(d) An unsealed contract made by Englishmen in England, and not valid by the law of England as to English property, is good as to real estate in Scotland, where a contract of the kind is not required to have a seal, and can be sued upon in an English court; the rule as to the seal being of the *lex loci rei sitæ*.(e) This plain and well-established rule has not been without its modifications and exceptions. Thus a recovery in Pennsylvania was allowed of the price of an oral sale in that state of land in Ohio, the defendant not having given proof of the Ohio Statute of Frauds, and the Pennsylvania statute not applying outside of Pennsylvania.(f) And in New York it was assumed that a common law rule, making a seal proof of consideration, applied to writings under the Statute of Frauds, even though the land contracted for was in Iowa.(g) There are several English cases which hold contracts made in England as to land abroad to be English contracts. Thus, where no one raised the objection that the Scotch law forbade it, an equitable mortgage by deposit made in England was sustained, though the land was in Scotland;(h) and it was said that, in equity, a contract in England as to land in other countries, especially within the British dominions, was treated as if made in England. Thus, also, a firm trading in London and Shanghai mortgaged lands and houses in Shaughai by deposit of title papers to a firm in Prussia, it was held that the contract was an English one, and the mortgage good as an encumbrance on the Shanghai

(c) Bissell v. Terry, 69 Ill. 190;
Danner v. Brewer, 69 Ala. 203; Story's
Confl. of Laws, § 435; 2 Burge's Confl.
of Laws, 869; see Marié v. Garrison,
Refer. Rep. pp. 42, 74; Doyle v. McGuire,
38 Ia. 412.

(d) Young v. Pearson, 1 Cal. 449.

(e) Adams v. Clutterbuck, 10 Q. B.
D. 406.

(f) Siegel v. Robinson, 56 Pa. St. 20.

(g) Burrell v. Root, 40 N. Y. (1
Hand), 496.

(h) *Re Courtney (Ex parte Pollard)*,
Mont. & Chitty, 249.

property.⁽ⁱ⁾ So, while a contract relating to land abroad would be under foreign law, yet a contract relating to land in Chili, made between an Englishman resident and domiciled in England and an Englishman resident but not domiciled in England, was held to be within the law of England.^(j)

§ 21. A perplexing element is introduced into the question when the contract is made in one place to be performed in another. In a Rhode Island case this distinction is set out with much precision; it was said that where a contract is entered into in one state to be performed in another, there are two *loci contractus*, the *locus celebrati contractus*, and the *locus solutionis*, and the law of the former governs the interpretation, nature, and validity of the contract, that of the latter its performance. And adding that though both of these might be complied with, yet a failure to satisfy the *lex fori* would be fatal, and, citing authorities for this, the court added: "There are cases which go farther and hold that a contract made in good faith in one state to be performed in another will be upheld if it conforms to the law of either state. In making such contracts, it is argued, the parties may have in view either the law of the state where the contract is made or the law of the state where it is to be performed; and, therefore, the contract, if made in good faith without any design to evade the law, ought to be allowed and enforced according to its presumable intent, *ut res magis valeat quam pereat*. This rule has been applied especially to stipulations for interest on contracts for the payment of money, and is commended by Professor Parsons as reasonable and just."^(k) Chief Justice Shaw has said that a contract made in one country to be performed in another is governed by the law of the latter, as a deed of land in a foreign state, or as a bill drawn to be accepted abroad,

(i) Scheibler (*In re*) (*Ex parte Holt-hauser*), L. R. 9 Ch. 722.

(j) *Cood v. Cood*, 33 Beav. 322; and on the question generally of the Statute of Frauds and the doctrine of *lex rei sitæ*, see Westl. Priv. Inter. Law, §§ 84, 98, 99.

(k) *Hunt v. Jones*, 12 R. I. 266, citing

Fisher v. Otis, 3 Chand. 83; *Depau v. Humphreys*, 8 Mart. N. S. 1; *Cromwell v. County of Sac*, 96 U. S. 51; *Bolton v. Street*, 3 Cold. 31; 2 Parsons on Contracts, 583; Wharton, Conflict of Laws, § 507; see, also, *Kleeman v. Collins*, 9 Bush, 460, citing cases; see West. Priv. Int. Law, §§ 171-183.

must be accepted in writing if the law of the latter country so requires.^(l) Where the *lex fori* and the *lex loci contractus* coincide in allowing oral evidence, the latter is admissible; it was lately said, though against the *lex loci solutionis*,^(m) because the *form* is regulated by the *lex loci contractus* and the *evidence* by the *lex fori*. Just how much weight should be allowed this dictum it is not easy to say. A firm doing business in Louisiana and elsewhere, dated certain notes in Louisiana; it was held in a suit in Connecticut that the contract was to be performed in Louisiana; the law of that state, requiring contracts for high interest to be in writing, applied.⁽ⁿ⁾ A United States court will not be bound by a decision of a court of the state, where a contract was made, which passed upon the application of the Statute of Frauds to an engagement which the Federal court, regarding as commercial in its character, held to be of a class as to which the state decisions were not binding.^(o) A guaranty made in England of an obligation made in Scotland is an English contract.^(p) The making of the contract and its performance were held in the following cases to be in the same state: Thus, where a contract of guaranty was made in New Jersey, where all the parties lived, to be fulfilled three months hence, and no place was named, the debtor was not obliged to follow his creditor to Pennsylvania, whither the latter had since moved before the three months were up, and consequently the Statute of Frauds of New Jersey applied even in an action in a court of Pennsylvania, where there was then no Statute of Frauds applicable to guaranties.^(q) Where a husband prior to his marriage was a citizen of Illinois, married in Pennsylvania, and immediately afterwards returned to Illinois and there remained, it was held that an antenuptial contract was governed by the law of Illinois and not of Pennsylvania, and must be in writing.^(r) An oral acceptance of a bill drawn

(l) *Carnegie v. Morrison*, 2 Metc. (Mass.) 398.

(m) *Pritchard v. Norton*, 5 Morr. Trans. 126 (S. C. U. S.), citing *Scudder v. Union Nat. Bk.*, 91 U. S. 406.

(n) *Tillotson v. Tillotson*, 34 Conn. 367.

(o) *Bradley v. Richardson*, 23 Vt. 731 (U. S. D. C.).

(p) *Littlejohn (Ex parte)*, 3 M., D., and De G. 186.

(q) *Allshouse v. Ramsay*, 6 Whart. 331.

(r) *Davenport v. Karnes*, 70 Ill. 467.

in Chicago on a firm in Missouri and accepted by one of the drawees then in Chicago is an Illinois contract, though the notes were to be paid in Missouri.(s) Another instance of the difficulty of determining as to which law shall apply to the contract arises when the latter comes within a prohibitive liquor law. The following are examples of contracts held to be performed where they were made: Thus, in a suit in Indiana it was held that where the contract was made in Iowa for the sale of liquors to the defendant, who lived in Iowa, by the plaintiff, who lived in Wisconsin, and the goods were shipped in Wisconsin to the defendant in Iowa and there accepted by him, the contract was an Iowa one, and void under the liquor law of that place.(t) So a contract in Indiana by the agent of an Ohio firm, the goods to come from Ohio, and the agent has power to conclude sales, is an Indiana contract.(u) An order for liquors given in Michigan to the seller followed by delivery of the liquors to a carrier in Ohio to be brought to the buyers in Michigan, is invalid under the Michigan liquor law.(v)

§ 22. In a Massachusetts case, where the agent of a Connecticut firm solicited an order in Massachusetts for liquors, and transmitted the order to his principals in Connecticut, who shipped the goods by a carrier to the buyer, who paid the freight, the court left it to the jury to find whether the agent was a selling agent or a mere solicitor for orders, and whether he actually sold in Massachusetts or only solicited the order; in the latter case the contract was a Connecticut one; if the agent made a final sale, the Massachusetts liquor law applied.(w) The following are also examples of contracts made abroad to be performed in the forum: An oral contract made in Germany by which the plaintiff was to work for the defendant in New York, is within the Statutes of Frauds of the latter state, even the "year" clause of that act.(x) Where the plaintiff's

(s) *Scudder v. Nat. Bk.*, 91 U. S. S. see *Wilcox Silver Plate Co. v. Green*, 72 C. 411. N. Y. 19.

(t) *Keiwert v. Meyer*, 62 Ind. 587.

(w) *Finch v. Mansfield*, 97 Mass. 91.

(u) *Hausman v. Nye*, Id. 487.

(x) *Turnow v. Hochstadter*, 7 Hun,

(v) *Webber v. Howe*, 36 Mich. 154; 80.

agent took in Michigan an order for liquors from the defendant residing there, and this order was approved by the plaintiff in Ohio, and the goods were sent to and received by the defendant, it was held in Michigan that this was an Ohio contract, and not invalid under the Michigan liquor law.(y) An order for liquors sent by the defendant in Michigan to the plaintiff in Wisconsin to be upon approbation, is a Michigan contract, as there was no delivery and acceptance to satisfy the Statute of Frauds and pass the title in the goods till an approval in Michigan.(z)

§ 23. In another set of cases the contract was made in the forum, but was to be performed elsewhere. Thus, the sale of a slave in Alabama made in Tennessee must be proved by a writing in a suit in Tennessee.(a) A sale of chattels made and sued on in Rhode Island may be orally proved though they were to be delivered in New York, where the Statute of Frauds applied to sales of chattels.(b) So, in New Jersey, a contract made and sued on in that state, relating to goods to be delivered in Philadelphia, must be proved by a writing under the New Jersey Statute of Frauds.(c) But where a written indemnity not expressing the consideration was given in Philadelphia to one who was surety for an administrator in Maryland, the District Court of Philadelphia said: The contract was within the Statute of Frauds, this being in force in Maryland, the next question is whether the law of Maryland or of Pennsylvania is to govern. It is said that the place of the contract is in this state, having been written here. To this it is properly answered, that the contract takes effect at its place of delivery as to a question of this kind, especially where, as upon its face is apparent, the subject matter of the contract existed. The laws of Maryland therefore govern the contract.(d) Where a contract was made in New York by the buyer's agent, the goods to be delivered to the buyer in Michigan, and there

Contracts made in the forum to be performed abroad.

(y) *Kling v. Fries*, 33 Mich. 277.

(b) *Hunt v. Jones*, 12 R. I. 266.

(z) *Rindskopff v. DeRuyter*, 39 Mich.

(c) *DaCosta v. Davis*, 24 N. J. L.

1.

319, citing cases.

(a) *Dougherty v. Curle*, 2 Humph.

(d) *Carroll v. Nixon*, 2 Miles, 432.

454.

was some evidence of a part delivery and acceptance in New York, and the jury finding the latter fact, the Supreme Court of the United States decided that the contract was a New York one, and not affected by the Michigan liquor law.(e) Where an order was given in Wales to the traveller of a dealer in London, and no mention was made of a carrier, and a carrier is selected by the seller, a cause of action arises in London.(f) The question of delivery and acceptance in these cases in relation to the Statute of Frauds is considered elsewhere.(g)

§ 24. The tendency of all or most of the adjudications which have thus far been given, is to make the law of the place of contract the important consideration. But there is a strong current of authority setting in the opposite direction, making the *lex fori* that which determines the admissibility of oral proof in cases arising under the Statute of Frauds. The leading case on this side of the question is *Leroux v. Brown*, which held that a contract made in France, and to be there performed, was governed, when sued upon in England, by the "year" clause of the Statute of Frauds; the Court of Common Pleas held the evidence to relate to the procedure upon and not to the solemnities belonging to the contract; and the judges relied both upon the language of the statute that "no action shall be brought," and upon the doctrine that oral contracts within the statute are not invalid, but only not provable, and that a subsequent memorandum was sufficient; all these considerations showing that the lack of writing was a question of evidence only.(h) In a case where no question of the Statute of Frauds arose, Lord Brougham

(e) *Garfield v. Paris*, 96 U. S. S. C. 566.

(f) *Copeland v. Lewis*, 2 Stark, 31.

(g) See the Chapter on Delivery and Acceptance.

(h) *Leroux v. Brown*, 12 Q. B. 801, distinguishing *Carrington v. Roots*, 2 M. & W. 254, and *Reade v. Lamb*, 6 Exch. 130, as not having the present point in view. (They were cited to show that the Statute of Frauds

went to the essence of an oral contract and made it void. See *Bates v. Chesebrough*, 32 Wis. 598.) See 9 Am. L. Rev. 444, 457; see *Corrigan v. Woods*, 1 Ir. Rep. C. L. 75, citing *Leroux v. Brown*, as good law. See also *Britain v. Rositer*, 11 Q. B. D. 123, Ct. App. following *Leroux v. Brown*, and *Adams v. Clutterbuck*, 10 Q. B. D. 406, saying that the Statute of Frauds was of the *lex fori*.

said evidence was a matter of the *lex fori*; and that evidence of the English judicial interpretation of an act of Parliament was not admissible in a Scotch case arising under a similar act.(i) But in another case, counsel arguing that a subsequent memorandum or delivery and acceptance of chattels sold had a retroactive effect, and made the oral contract valid, *ab initio* relied on *Leroux v. Brown*; without deciding the point, the Court of Common Pleas expressed doubt as to the latter case, Judge Willes saying that it would take further argument to convince him of its correctness.(j) It has been held in England that a bill drawn in France in such a form that it could not there be sued upon, was nevertheless the subject of a recovery in England, but *semble* that this was in absence of proof of the French revenue law.(k) An instrument executed in Scotland, and by the law of that country equivalent to a deed sealed, can be sued on in England by a stranger thereto, as in point of fact it was not sealed; the benefit of the instrument was all reserved therein to the plaintiff.(l) A Connecticut case is fuller on the point than any other that can probably be found: it was held that the Statute of Frauds of the forum only applied, and that a contract was good in the absence of such a law, though there was a Statute of Frauds in the place of contract; it was said that evidence was a question of procedure, and that in this respect there was(m) no difference between the Statute of Frauds and the Statute of Limitations. Speaking of the law of the place where the contract was made, and that of the place where it was to be performed, it was said by the Supreme Court of Rhode Island: A contract, however, may be valid by the law of both places, and yet fail practi-

(i) *Bain v. Whitehaven, etc.*, R'way, 3 H. L. C. 18.

(j) *Williams v. Wheeler*, 8 C. B. N. S. 299, Erle, J., citing *Carrington v. Roots*, and *Reade v. Lambe*, as *contra* to *Leroux v. Brown*.

(k) *Wynne v. Jackson*, 2 Russ. 352.

(l) *Carnegie v. Waugh*, 2 D. & Ryl. 279.

(m) *Downer v. Cheseborough*, 36 Conn. 45, citing *Leroux v. Brown*, *Bain v. Whitehaven R.w.*, *Yates v. Thomson*, 3

Cl. & F. 544; *Don v. Lippman*, 5 Cl. & F. 1; *Story on Conflict of Laws*, and *Browne on Statute of Frauds*. It should be noted, *Don v. Lippman* was a case of the Statute of Limitations, and *Yates v. Thomas* one of wills and domicile; *Downer v. Cheseborough* is approved by the Supreme Court of the United States in *Pritchard v. Norton*, 5 Morr. Trans. 126. See *Rorer on Interstate Law*, 60, citing cases.

cally, if the *lex fori* does not permit its enforcement. The rule thus laid down, considered as a rule for personal contracts, though it is at variance with many dicta and decisions, is well supported on authority.”(n) In Kentucky, the Statute of Frauds of that state (the “year” clause) was held to apply to a contract sued on in Kentucky, but which had been made in Illinois to be performed in Louisiana; there being such a law in Illinois but not in Louisiana.(o) In Louisiana it has been held that the standard as to the competency of witnesses is the *lex fori*.(p)

(n) *Hunt v. Jones*, 12 R. I. 266, citing *way Co.*, 3 H. L. C. 1; *Van Reimsdyk v. Dacosta v. Davis*, 24 N. J. Law, 319; *Kane*, 1 Gall. 371; *Wharton*, Conflict of Laws, § 401, p. 676; *Story*, Conflict of Laws, § 234.
Cooper v. Waldegrave, 3 Beav. 282; *Vidal v. Thompson*, 11 Mart. La. 23; *Aymar v. Sheldon*, 12 Wend. 439; *Chapman v. Robertson*, 6 Paige, 627, citing cases.
 634; *Bain v. Whitehaven, etc. Rail-* (p) *Buckner v. Watt*, 19 La. 215.

CHAPTER III.

GUARANTIES IN GENERAL—THE PROMISE—
THE CONSIDERATION.

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- § 72. The Leading Purpose Rule; general statement.
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§ 25. THAT great bulk of adjudicated law found necessary to explain the provision of the Statute of Frauds which requires written evidence of a promise to answer for debt, default, or miscarriage of another, cannot be either simply or easily arranged; the distinction between the classes of cases is so subtle and contradiction in the decisions is so common that no ordinary analysis will be found satisfactory. The following is suggested as fairly logical and practical: Dividing the subject into the three heads of: the Promise in general; the Consideration; the Parties thereto; and the Subject-matter of the Promise, there will be found treated under the first head, or the Promise in general, the following:—

Arrangement of subject.

§ 26. Promises to answer for the debt, default, or miscarriage of another are by the terms of the Statute of Frauds required to be proved by a writing signed by the party to be charged. (a) Even before the Statute of Frauds the defendant might have waged his law when sued on a guaranty. (b) In Pennsylvania, even prior to the act of

I. THE PROMISE generally.

(a) See the following as some general examples of this rule: Hollingsworth *v.* Martin, 23 Ala. 597; Townsend *v.* Jones, 47 Ala. 481; Johnson *v.* Morris, 21 Ga. 239; First Baptist Church *v.* Hyde, 40 Ill. 150; Druly *v.* Hunt, 35 Ind. 509; Mitchell *v.* Ray, 3 Kent. Law Reporter, 754; Hill *v.* Atwater, 24 La. Ann. 325; Baker *v.* Pagaud, 26 La. Ann. 221; Hamilton *v.* Hodges, 30 La. Ann. 1293; Wagner *v.* Egleston, 49 Mich. 222; Preston *v.* Young, 46 Mich. 103; Dufolt *v.* Gorman, 1 Minn. 309; Lombard *v.* Martin, 39 Missi. 151; Shymer *v.* Westbrook, Pennington, 976; Ayres *v.* Herbert, Pennington, 662;

Youngs *v.* Shough, 3 Green, S. C. N. J. 28; Williams *v.* Doran, 8 C. E. Green, 387; Rose *v.* Johnson, 1 Pennington, 5; Erwin *v.* Waggoman, Cooke (Tenn.), 403; Davis *v.* Evans, 39 Vt. 188; Forbes *v.* Temple, 3 Can. L. T. (S. C. N. B.) 457; Fitzgerald *v.* Dawe, Sel. Cas. Newf. 177. For a form of written guaranty, see Chitt. Commer. Law, pp. 4-5; Smith, Merc. Law (9th ed.), 460, n. (a).

(b) Fish *v.* Richardson, Yelv. 55; S. C. sub nom. Fisher, Cro. Jac. 47; see Davis *v.* Rayner, 2 Keb. 758; Russel *v.* Haddock, 1 Lev. 788; Scott *v.* Stevens, Sid. 89.

1855, requiring written evidence of a guaranty, the oral proof was closely scrutinized.(c)

§ 27. The provision requiring written evidence of a guaranty is also to be found in the law of Louisiana,(d) and in that of Lower Canada.(e) A guaranty under the Scotch law cannot, as a rule, be proved by witnesses, but can by the party's oath, or answer in the pleadings.(f) At an early day it was decided that, by the Scottish act of 1681, a guaranty must be a holograph, and have witnesses, and that a guarantor could not be called upon to say whether his signature to an informal instrument was genuine or not.(g) At a later time an important distinction was taken, and the rule was relaxed in two respects, viz., in allowing a less formal writing, and in giving a validating effect to any acts done in reliance upon the guaranty, providing the latter did not involve a feudal right (as, for example, a heritage, or what in English law are analogous to real interests); where the promise is an ordinary guaranty, the writing not being of the essence of the contract, the signature may be acknowledged, or oral proof be admitted if there has been part performance.(h) The general principle is that guaranties must be proved by a writing, except where the person relying upon the guaranty has forborne any of his rights.(i) There is a further limitation to the rule, and while a guaranty made at the same time as the principal debt can be proved orally, *secus* as to a guaranty of future obligations. If the guarantor had acted continuously under the guaranty the proof might have been suf-

Civil law as to guaranties.

(c) *Petriken v. Baldey*, 7 W. & S. 430.

(d) Acts 1858, No. 208; *Merz v. Labuzan*, 23 La. Ann. 747; *Schmidt v. Ziegler*, 34 La. Ann. 818.

(e) *Reeves v. Malhiot*, 8 Low. Can. Jour. 84.

(f) *Brown v. Campbell*, Bell Fol. Cas. 115.

(g) *Edmonstone v. Lang*, 38 Mor. Dec. 17057; see *Stewart v. Russell*, 18 Fac. Dec. 496.

(h) *Sinclair v. Sinclair*, Bell Fol.

Cases, 141-2; *Edmondstone v. Lang* being questioned.

(i) *Chaplin v. Allan*, Court of Sess. Cas. 4 D. 616; 18 Scot. Jur. 250, which see for interesting discussion of the subject; see Lord Moncrieff's opinion, p. 618, note, for a citation of authorities. See *Dunmore Coal Co. v. Young*, 16 Fac. Dec. 171, as to the effect of *rei interventus*, or part performance as validating an oral guaranty. That part performance has no such effect in English law, see § 31, *infra*.

ficient.(j) Where a guaranty was given for the price of certain yarn furnished and to be furnished, all the court agreed that it was, as to the future supply, an obligation *in re mercatoria* and valid, though evidenced only by an informal writing; holographs or witnessed writings being inconvenient in the pressure of affairs; as to the past supplies two of the judges thought that there should have been a solemn instrument, there being no haste as to these, and so thought a third judge, who, however, thinking the contract inseverable, held it all good, and voted with three others of the court, who held that the rule as to past supplies was the same as that applying to future ones; one of the judges thought that but for the guaranty for the price of the goods previously delivered the future supply would not have been promised, and that, therefore, there was part performance.(k) It was questioned in another case whether the repayment of money advanced by a bank is an obligation *in re mercatoria* or not.(l) The following statement of the Scottish law is made by Baron Hume:(m) "In our law one may be effectually bound by a prior verbal engagement as a contract for the price of movable goods, and the engagement may be proved against the cautioner, as the sale may against the buyer by the testimony of witnesses (citing cases). But this seems only to be true where . . . the cautioner interposes his credit at the time of the sale, and thus induces the vendor to part with his commodity without immediate payment. In that case by delivery, *res non sunt integræ*, and the cautionary is construed as an incident in the contract of sale. The like latitude is not allowed when the cautioner does not engage till after the commodity has been sold and delivered. In these circumstances the seller has not done any-

(j) *MacEwan v. Crawford*, 18 Fac. Dec. Scotch, 78; (Ct. Sess.); see cases cited by counsel; see *Gibb v. Walker*, Elch. "Cautioner," No. 19; *Campbell v. McLauchlan*, 29 Morr. Dec. 12288; *Burge on Surety*. 37; (*Re*) *Bell*, 17 Fac. Dec. (Scotch) 1, (Ct. Sess.); *Rhind v. Mackenzie*, 18 Fac. Dec. 99, First Div. Ct. Sess.

(k) *Paterson v. Wright*, 15 Fac. Dec. 548; see Part Performance and "Severability."

(l) *Johnson v. Grant*, Ses. Cas. 6 D. 875; 16 Scotch Jur. 376; S. C. sub nom. *Grant v. Johnston*, Ses. Cas. 7 D. 390; 17 Scotch Jur. 141.

(m) *Campbell v. Monro*, Hume, 106; see, as to English law, § 31.

thing in reliance on the cautioner's credit or promise, and the cautionary is not coupled with the principal bargain in that intimate and plain way which obviates the view of misconception on the part of witnesses." There should, said Baron Hume, be at least the oath of the party. In a later case it was held that a guaranty of the price of goods sold was good, *inter rusticos*, when there was a delivery of the goods on the faith of the guaranty.⁽ⁿ⁾ Gratuitous promises, it is said, require the guarantor's oath as proof if there is no writing.^(o) Lord Eldon considered that the principles of the law of guaranty were the same in Scotland as in England, but this is only generally true.^(p) The law of the two countries has, however, been approximating on this point, and the Statute of Frauds has by statute been extended to Scotland.^(q) Under the Code of Justinian a married woman could give a guaranty by a public instrument, signed by two witnesses.^(r)

§ 28. As will be seen hereafter there are numerous exceptions to the rule, that a guaranty must be proved by a writing, and the law on the whole subject is in many respects unsettled. It will be the aim, in the following pages, to make a full exposition of the authorities, and it may be well to refer to other works where a like consideration is given to these important questions; in the note below such reference will be found.^(s) A conditional guaranty is within the Statute of Frauds.^(t) It has been held in a case given elsewhere, that it was competent to show

General
points and
conditional
guaranties.

(n) *Hardie v. Macdonald*, Ses. Cas. 6 D. 72.

(o) *Burge Surety*. 37.

(p) *Burge Surety*. 37; see *Grant v. Campbell*, 6 Dow, App. Cases, 239, 252.

(q) See 19 and 20 Vict. c. 60, § 6, and see § 7.

(r) *Mackenzie's Roman Law*, 265. For an elaborate consideration of the Scottish law of Guaranty, see 1 Bell Comm. (McLaren's ed.), p. 402 *et seq.*

(s) See *Birkmyr v. Darnell*, 1 Sm. L. C. (7th American ed.) 490; *Pitman on Princ. and Sur.* 4; *Degolyar on Guar.*

49, App.; *Brandt on Surety*. § 37 *et seq.*; 2 Dan. on Negot. Inst. 3d ed. § 1762 *et seq.*; Civ. Code Cal. (1874), § 12794.

See *Throop, Browne, and Agnew on the Statute of Frauds*, *Burge on Surety*, *Whart. Ev.* § 878, and the treatises on Evidence and Contracts. In *Stephen's Nisi Prius*, ii. 1963, it was said that the "law respecting collateral promises was settled." In 16 *American Jurist*, 295-8, a contrary statement of almost as exaggerated a character will be found.

(t) *Barry v. Law*, 1 Cranch, C. C. 77; *Dufolt v. Gorman*, 1 Minn. 309.

that a written promise to pay the rent of a certain house was really a guaranty, and invalid for not stating a consideration; the proof being to the effect that the house was occupied by a certain third person, who was in arrears as to his rent; this doubtful conclusion will be considered more at length in another place.^(u) So a promise to pay the debt if the creditor would prove it in a certain way.^(v) Where a writing shows a guaranty with a condition implied from the language, oral evidence of an unqualified guaranty is not admissible.^(w)

§ 29. Guaranties are usually spoken of as "collateral" contracts, and all others as "original." In a case in 13th Gray the court said: "The terms "original" and "collateral," as applied to undertakings in connection with the Statute of Frauds, though not found in the statute, are often used in applying it; and, being significant and intelligible, are convenient.^(x) So it has been said that these terms are good, but must be carefully used;^(y) and, though much criticized, are correct.^(z) The circumstances of the transaction, and not the mere words, determine whether the Statute of Frauds applies.^(a)

§ 30. But the phraseology of the guaranty itself is not without interest; and since it must be the subject of almost every part of this chapter, a passing notice of the point will be sufficient here. In the leading case of *Birkmyr v. Darnell*, it was said that if two come to a shop, and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you I will," this is a collateral understanding, etc. But if he says, "Let him have the goods, I will be your paymaster," or I will see you paid,

(u) *Clark v. Richardson*, 4 E. D. Smith, 174; see *Nat. Bank v. Bennett*, 33 Mich. 524. (S. C.), 501.

(v) *Brown v. Barnes*, 6 Ala. 694.

(w) *Johnston v. Kimball*, 39 Mich. 187.

(x) *Stone v. Walker*, 13 Gray, 615, citing *Nelson v. Boynton*, 3 Metc. 400, saying that the terms though convenient enough, are not used in the sta-

(y) *Mallory v. Gillett*, 21 N. Y. 413.

(z) *Gibbs v. Blanchard*, 15 Mich. 299; *Nelson v. Boynton*, 3 Metc. (Mass.) 400; see *Bull. N. P.* p. *281 a; *Selw. N. P.* (7th Am. ed.) p. *847, criticizing these phrases.

(a) *Blank v. Dreher*, 25 Ill. 333; see *Reed v. Holcomb*, 31 Conn. 363.

this is an undertaking as for himself.(b) It has been held that the words "will see you paid," without more, import a collateral undertaking within the Statute of Frauds.(c) So in a Maryland case the court said: We do not say that in every case where the words, "I will see the bill paid," are used, they necessarily import a collateral undertaking, and that in no such case could the plaintiff recover; but, that where they stand alone, as here, they must be so interpreted.(d) In the case already cited in 13th Gray, the court, after saying that an oral promise to pay for goods to be delivered to another, may be valid, added: "But if the language is, 'Let him have money, or goods, or service for him, and I will see you paid;' or 'I promise you that he will pay;' or 'If he don't pay, I will;' this is collateral; and, though made on good consideration, it is void by the Statute of Frauds. These distinctions, though somewhat close, are plain." The following language was regarded as justifying a verdict in favor of the alleged guarantor: "We want you to go to Southbridge and take care of this case; they are abusing Comfort, and I mean to stand by him; I mean to assist him."(e) The phrase "I will see you paid," has been regarded as not necessarily importing a collateral or an original promise.(f) Where the language was: "J. S. will apply to you for the rent, etc., of your building, etc., any arrangement he can make with you as regards renting the same, I will be responsible for," it was held that so far as necessity of demand or notice was concerned, this is to be treated as an original contract, and not a guaranty.(g) The word "guarantee" does not necessarily imply a guaranty.(h) Where a promise is in form absolute,

(b) *Salk*, 27 (a); S. C., *Burkmire v. Darnell*, Mod. Cas. 248; 1 Sm. L. C. (Am. ed.) 371*; see *Davis v. Caverly*, 120 Mass. 415.

(c) *Watkins v. Perkins*, 1 Ld. Ray. 224, making the distinction that the words "will be your paymaster" import an original promise; *Wagner v. Hallack*, 3 Col. 183, citing cases; see *Thwaits v. Curl*, 6 B. Mon. 472.

(d) *Cropper v. Pitman*, 13 Md. 195.

(e) *Stone v. Walker*, 13 Gray, 615.

(f) *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; 7 id. 196; 7 H. L. C. 24; *Bond v. Treahey*, 37 U. C. Q. B. 365; see *Allen v. Scarff*, 1 Hilt. 212.

(g) *Bates v. Starr*, 6 Ala. 698; see *Copeland v. Wadleigh*, 7 Me. 149.

(h) *Packer v. Benton*, 35 Conn. 349; *Moorehouse v. Crangle*, 36 Oh. St. 131.

it must be held to be original, unless shown to be collateral.⁽ⁱ⁾

§ 31. After much doubt and some contradiction among the earlier English cases, it is now settled, that, so far as the Statute of Frauds is concerned, there is no distinction between a guaranty for respectively a past, a present, or a future debt of another.^(j) Lord Mansfield, who had been the one to make a distinction between a guaranty of a past debt, and a guaranty in reliance upon which the creditors trusted the party answered for, treating the latter as not within the Statute of Frauds, afterwards admitted that, on authority, both the engagements were equally invalid if oral. He said in a case in 3d Douglass: "Before the case of *Jones v. Cooper*, I thought there was a solid distinction between an undertaking after credit given, and an original undertaking to pay, and that in the latter case, the surety being the object of the confidence, was not within the statute. But, in *Jones v. Cooper*, the court was of opinion that wherever a man is to be called upon, only in the second instance, he is within the statute; otherwise, where he is to be called upon in the first instance. Here, by the words of the promise, Sylva was to be called on first, the defendant undertaking to pay if Sylva did not pay. The case is not distinguishable from *Jones v. Cooper*, and the words of the statute are very strong. Judge Buller said that *Jones v. Cooper* was fully as strong for the plaintiff, for there the original debtor was known to be

Guaranty
for a past,
present, or
future debt
respec-
tively, and
the effect of
reliance
upon the
oral pro-
mise.

(i) *Briggs v. Evans*, 1 E. D. Smith, 195.

(j) *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; *Marshall v. Wilson*, 18 Ir. Jur. N. S. 170; *Wilson v. Marshall*, 11 Ir. Rep. 360; *D'Wolf v. Rabaud*, 1 Peters, 499; *Townsley v. Sumrall*, 2 Pet. 182; *Emerson v. Slater*, 22 How. U. S. 35; *Kurtz v. Adams*, 7 Eng. (Ark.) 177; *Wagner v. Hallack*, 3 Col. 183; *Denton v. Jackson*, 15 Chic. Leg. News, 309, S. C. Ill.; *Steadman v. Guthrie*, 4 Metc. (Ky.) 152; *Doyle v. White*, 26

Me. 341; *Elder v. Warfield*, 7 Harr. & J. 396; *Gibbs v. Blanchard*, 15 Mich. 299; *Watkins v. Sands*, 4 Bradw. 209; *Holmes v. Knights*, 10 N. H. 176; *Walker v. Richards*, 39 N. H. 264; *Hetfield v. Dow*, 3 Dutch. 440; *Chase v. Day*, 17 John. 114; *Rogers v. Kneeland*, 13 Wend. 121; *Allshouse v. Ramsay*, 6 Wh. 336; *Mallory v. Gillett*, 21 N. Y. 413; *Mizner v. Spier*, 13 Lanc. Bar, 78; *Bronson v. Stroud*, 2 McMull. 372; *Matthews v. Milton*, 4 Yerg. 576; as to the Scottish law, see *supra*, § 27.

worth nothing." In the principal case the person answered for would not have been trusted but for the guaranty.^(k) The case cited by Lord Mansfield was as follows: The defendant, before certain goods were delivered to S., said to the plaintiff, "I will pay you if S. does not." The plaintiff cited *Mawbrey v. Cunningham*, and Lord Mansfield *arguendo* supported that case, but added that the conditional feature of the present promise might make a difference. The next day the whole court, by Lord Mansfield himself, held that the promise was a plain guaranty.^(l) Judge Buller, in a later case, said of *Jones v. Cooper*: "I was for the plaintiff, and cited the case of *Mawbrey v. Cunningham*, in which Lord Mansfield said 'this is a promise made before the debt accrues; and what is the reason of the tradesman's requiring the promise? It is because he will not trust the person for whose use the goods are intended,' and the plaintiff obtained a verdict. But Nares, J., overruled this determination and nonsuited the plaintiff; and this court afterwards refused to grant a new trial. If this were a new question, the leaning of my mind would be the other way; for Lord Mansfield's reasoning in the case of *Mawbrey* and *Cunningham* struck me forcibly. But the authorities are not now to be shaken; the general line now taken is, that, if the person, for whose use the goods are furnished, is liable at all, any other promise by a third person to pay the debt must be in writing, otherwise it is void by the Statute of Frauds."^(m) The law, as thus established, has been followed in America.⁽ⁿ⁾ The question is well resolved in a Missouri case, in which the court said: "It seems to be

(k) *Peckham v. Faria*, 3 Doug. 13; see *Parsons v. Walter*, reported in note to the above, saying that *Mawbrey v. Cunningham*, cited in Cowp. 228, is overruled by *Jones v. Cooper*.

(l) *Jones v. Cooper*, 1 Cowp. 228; see S. C., Loft. 769, somewhat differently reported; the promise said to lay no ground for recovery because conditional, and because the proper steps had not been taken against the person first liable.

(m) *Matson v. Wharam*, 2 T. R. 80.

(n) *Leonard v. Vredenburg*, 8 Johns. 37 (class first of Judge Kent's classification); *Simpson v. Hall*, 47 Conn. 425; *Huntington v. Wellington*, 12 Mich. 11; *Elder v. Warfield*, 7 Harr. & John. 396; *Weyand v. Crichfield*, 3 Grant (Pa.), 113; *Doolittle v. Naylor*, 2 Bosw. 224; *Wilson v. Roberts*, 5 Bosw. 107; *Hanford v. Higgins*, 1 Bosw. 448; *Bloom v. McGrath*, 53 Missi. 257.

well settled, that whether a contract comes within the provisions of the statute or not, depends wholly on the agreement. If a party agrees to be originally bound, the contract need not be in writing; but if his agreement is collateral to that of a principal contractor, or is that of a guarantor or security for another, the agreement must be in writing. It makes no difference in such case, whether the promise is made prior to the passing or delivery of the consideration or afterwards. If it is made before, and is a part of the original contract, that the guaranty shall be given, then the original consideration for the contract will be sufficient to uphold the guaranty; but if the guaranty is made after the original contract has been fully executed, then the guaranty must have a new consideration to uphold it; but in either case the contract must be in writing.”(o) There has been some tendency in the United States to revert to Lord Mansfield’s first view. In a late California case it was said that “it is also the settled law in this state and elsewhere, that the promise of a guarantor is not within the Statute of Frauds if made before the delivery of the note, or if made at such time or under such circumstances that the note and guarantee constitute in fact one transaction. In these cases the guarantee is considered as an original contract, resting upon the consideration of the contract which is guaranteed.”(p) In an early California case, in which the guaranty, written on a lease, did not in terms express a sufficient consideration, the Supreme Court of that state held that the Statute of Frauds did not apply because, although the consideration was not expressly stated in the writing, yet the complaint alleges that it was executed at the same time as the lease, and was the consideration upon which the plaintiff executed the lease to the person answered for.(q) It was said in a Federal decision, holding the principal case to be ruled by the Statute of Frauds, that “this was not a case where the

(o) *Glenn v. Lehn*, 54 Mo. 52.

(p) *Crooks v. Sully*, 50 Cal. 257; see *Ford v. Hendricks*, 34 Cal. 673, and *Howland v. Aitch*, 38 id. 135, citing California cases.

(q) *Evoy v. Tewksbury*, 5 Cal. 286; see chapter on the Memorandum; the

consideration of the lease might have been held to be that of the guaranty, the two being contemporaneous, but the court did not rest the case on that ground; see *Mizner v. Spier*, 96 Pa. St. 533.

guaranty or promise, which is collateral to the principal contract, is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. In this case the collateral undertaking of the bank was subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability was the ground of the promise.”(r) Judge Story, in *D’Wolf v. Rabaud*, said, whether by the true intent of the statute it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time between the parties, or whether it was to be confined to cases where there was already a subsisting demand, and the promise was merely founded upon a subsequent and distinct understanding, might, if the point were entirely new, deserve very grave deliberation.(s) In an early Massachusetts case the facts were, that on the back of a note made to the plaintiff by C., the defendant endorsed a similar promise; a declaration on the latter as an original promise was held to be correct, as the two being on the same paper did not make the latter a guaranty of the former.(t) In a case in 8 Cushing the court said, the exception is also taken that, as the guaranty was a contract collateral to the note, a distinct consideration should be proved. There would be force in this objection had the guaranty been made after the note had been made, delivered, and received as a complete contract.(u) By an odd perversity in an early Michigan case, one of the judges of the Supreme Court, taking the distinction made by Lord Mansfield, adopted the converse of his lordship’s first view, and said that a subsequent guaranty of a previous debt was not within the Statute of Frauds, being necessarily, if a valid contract, on a new consideration, and that the statute only applied where the guaranty was previous to or contemporaneous with the other contract.(v) This view

(r) *Morse v. Mass. Bank*, 1 Holmes, 213; see *Mizner v. Spier*, 96 Pa. St. 533.

(s) *D’Wolf v. Rabaud*, 1 Peters (S. C.), 501; see *Carville v. Crane*, 5 Hill, 484, denying this dictum; see § 97 *et*

seq.

(t) *Carver v. Warren*, 5 Mass. 546; see *Wilson v. Ray*, 13 Ind. 6.

(u) *Bickford v. Gibbs*, 8 Cush. 156.

(v) *Huntington v. Wellington*, 12 Mich. 11.

is believed to be unique. The now established rule, that reliance upon the guaranty does not, as in the Scotch law, make oral evidence admissible, is the one most loyal to the Statute of Frauds; the opposite doctrine would make the statute merely a dead letter; as will be seen later, where the reliance upon the guaranty is exclusive in its character, and no credit at all is given to the person answered for, the Statute of Frauds does not apply; the mere fact, however, that but for the guaranty the creditor would not have entered into the contract, does not alone take the case out of the statute.(w) By statute in Missouri it is provided that, while a written acceptance of a bill is generally necessary, an oral one is valid, as to one who, on the faith thereof, has negotiated the bills.(x)

§ 32. At this point it becomes important to note a few cases in which an oral collateral promise is so tainted with Fraud. fraud that the promissor is held. Thus, where negroes were sold cheap to a third party on the defendant's verbal agreement that they should be kept in the neighborhood, and were for the vendee's own use, but in fact the defendant knew the vendee was a dealer, and the negroes were removed to another state, the defendant is liable in an action of fraud; his engagement is not a guaranty protected by the Statute of Frauds.(y) And where one undertakes to manage the proceeding at law to recover a debt, he must do the best he can, and after taking better care of a claim of his own than of that of his principal, he cannot assert that his promise was a verbal guaranty—the statute has nothing to do with the case; the defendant here directed execution on his own judgment to be levied on a more valuable property than was that on which he had issued execution of the plaintiff's judgment; both held judgments against the same debtor; the defendant was treated as a trustee *ex maleficio*.(z)

(w) *Bloom v. McGrath*, 53 Missi. Johns. 559; see § 149. There was no debt, default, or miscarriage of another answered for.

(x) *Flato v. Mulhall*, 72 Mo. 523; (z) *Fairland v. Hampshire*, 7 W. N. see Mo. Rev. Stat. ch. 10, § 533, § 537. C. 92; see *Hale v. Stuart*, 76 Mo. 21, As to the Scotch rule, see *supra*, § 27. § 137.

(y) *Adams v. Anderson*, 4 Harr. &

§ 33. The well-known distinction between guaranties and representations as to the credit of another was early taken. (a) Lord Erskine said that *Pasley v. Freeman* stood on the clearest principle of jurisprudence and had no connection with the Statute of Frauds, which applies where one man undertakes for the debt of another. (b) While Lord Eldon said the guaranty clause of the Statute of Frauds had been considerably cut down by recovery, on the ground of fraud. (c) Where the promisor bought a horse, and in payment gave the note of a certain third person, and warranted expressly the solvency of the maker, and said that the latter had property, etc., the court said, that "it will be observed that the complaint charges an express warranty made as part of the contract, and for the purpose of securing property from the appellee, and not for the purpose of obtaining credit for the maker of the note. We do not think the case made by this paragraph is within the Statute of Frauds. It is a count upon an express warranty of solvency, not an undertaking to answer for the debt, default, or miscarriage of another. Nor does the complaint charge a representation of the solvency of another for the purpose of obtaining credit for him. The warranty was part of the contract, and was made for the purpose of obtaining the appellee's property, and is not within the letter or spirit of any of the provisions of the statute. The warranty declared on is in no sense an undertaking for the maker of the note, it is simply a warranty of his financial ability to pay. It is the ability, not the liability, that is warranted." (d) Where there is both a representation as to credit

Representations as to credit.

(a) *Pasley v. Freeman*, 3 T. R. 51; *Tapp v. Lee*, 3 Bos. & P. 371. Chamber, J., says that there should be an act of Parliament requiring written evidence of such representations. As there now is in Lord Tenterden's act, 19 and 20 Vict. c. 97; see *Backhouse v. Hall*, 6 B. & S. 511; *Schmidt v. Ziegler*, 34 La. Ann. 818; see 18 Can. L. J. 431, suggesting that a warranty of a horse should be in writing.

(b) *Clifford v. Brooke*, 13 Ves. 134.

(c) *Carr (Exp.)* 3 V. & B. 110; see *Upton v. Vail*, 6 Johns. 183, in which *Pasley v. Freeman* is said to have nothing to do with the Statute of Frauds, notwithstanding Lord Eldon's dicta; and see *Rickard v. Stanton*, 16 Wend. 26; *Huntington v. Wellington*, 12 Mich. 11.

(d) *Hassinger v. Newman*, 83 Ind. 125; citing *Huntington v. Wellington*, 12 Mich. 10.

and a guaranty given, some conflict of decision prevails. In a case in 24 Barbour it was held, that a declaration that the party answered for is solvent, falsely made, makes the person so declaring liable, though at the same time he gave a parol guaranty invalid under the Statute of Frauds; he declined to give a writing, because forbidden by his partnership articles.^(e) On the other hand, in an earlier New York case, where there was a declaration alleging that the defendant fraudulently promised to endorse the note of C. and H., and thereby induced the plaintiff to furnish goods to C. and H., and that the defendant, when making the promise, did not intend to fulfil it, and also alleging that the defendant knew C. and H. to be in bad credit, and in order to defraud the plaintiffs, and enable C. and H. to get the goods, promised to endorse, etc., it was held, that this was a guaranty under the Statute of Frauds, there being no other fraud than the breach of the parol guaranty, and that no action for deceit lay.^(f) And in a case in 2 Starkie there was an action on the case against the defendant for a fraudulent representation that one Hollingwood was a trustworthy man, and a man of property, and that his wife had an annuity of £50, in consequence of which the plaintiff was induced to give Hollingwood credit, whereas he was in insolvent circumstances. Hollingwood stated that the defendant had told the plaintiff that he might lend him (Hollingwood) £20 or £30, and that he would be perfectly safe; and that he (the defendant) would see the plaintiff paid. And Lord Ellenborough said, these cases came out almost always according to the truth. A promise having been made to guarantee the plaintiff which is within the statute, there being no note in writing, he brings an action for the misrepresentation. This is nothing more than a guaranty within the Statute of Frauds.^(g) Where a firm of bankers advertised that they were the owners of, and personally liable for certain notes of a banking corporation, it was held that the Statute of Frauds did not apply, and that they were liable to

(e) *Sweet v. Bradley*, 24 Barb. 552;
see *Overton v. Tracey*, 14 S. & R. 323.
Oral guaranties were then, however,
valid in Pennsylvania.

(f) *Gallager v. Brunel*, 6 Cow. 350.
(g) *Smith v. Harris*, 2 Stark. 43.

any one who relying upon their representations took the notes. This case appears^(h) to be open to a good deal of doubt. A promise that on a certain sale of a chattel by a third person the promissor will be liable for the title is either a guaranty or representation as to credit, and must be in writing.⁽ⁱ⁾ The following case has features which distinguish it from an ordinary guaranty: The defendant was sought to be held on an assurance which he had given as to the promissory note of one Hayden, who proved to have been a minor when he gave the note, and the defence of the Statute of Frauds was relied on, the court, in an Indiana case, noting that inasmuch as the person answered for was not liable, the defendant's engagement would at any rate be original, added: "The second assignment presents the question whether or not a verbal guaranty that a note is a genuine and valid one, and its maker liable to pay it, made by the assignor to the assignee at the time of its assignment and delivery, based upon a sufficient consideration, is a valid and binding obligation. It will be observed that this guaranty is not in terms a special promise to answer for the debt, etc., of another; nor can it be construed, as we believe, to embrace such an undertaking. It does not purport to be a promise to pay the debt for which the note was given, nor a promise that Hayden himself should pay it, but is simply a guaranty that the note is genuine, and that Hayden is bound by it. It differs entirely from a promise to pay the debt. In such case, if the promise is valid, nothing short of payment amounts to a compliance; whereas, in this case, if the note is genuine, and Hayden had capacity to make it, the obligation is fulfilled without any payment at all; indeed, it is not broken. The promise to answer for the debt of another is an undertaking to do something in the future, whereas a guaranty that a third person is liable upon a note signed by him is no promise at all, but is rather an assurance that a certain condition of things exists. A breach of such undertaking does not depend upon the failure of the guarantor to do something in the future, but if the condition does not exist the

(h) *Tarbell v. Stevens*, 7 Iowa, 166.

(i) (*Re*) *Tozer*, 46 Mich. 300; Compiled Laws Mich. §§ 4698, 4701.

undertaking is broken as soon as made, and a cause of action at once accrues, whether the note has or has not matured.”(j)

§ 34. A promise to give a guaranty is as much within the Statute of Frauds as the guaranty itself, and an oral promise by one to guarantee a note which he refused to endorse, and which the plaintiff took in reliance upon the guaranty, is invalid.(k) In a case in the Exchequer Chamber, Pollock, C. B., said: “My brother Blackburn has, in the course of the argument, stated that which appears to me to dispose of this case, viz., that a contract to give a guaranty is required to be in writing as much as a guaranty itself. If we were to hold that a contract of guaranty must be in writing, but that a contract to give a guaranty need not, we should, I think, be committing the same mistake our predecessors did with reference to the Statute of Uses.”(l) A promise, therefore, to endorse a note is within the Statute of Frauds.(m) So a promise to go security for the delivery of property.(n) A promise to procure a guaranty is not within the Statute of Frauds, because no one but the promissor is liable thereon.(o)

§ 35. Special guaranties required by statute, such as a recognizance, or security for costs on an appeal, are not within the Statute of Frauds, and, though not signed or stating a consideration, are unaffected by the latter statute.(p) There has been some expression of an opposite opinion on this point: thus, in an early New York case, speaking of security required by statute from a defendant, asking for adjournment of suit, the court says: The

(j) *King v. Summitt*, 73 Ind. 314. See further, as to representations as to credit, the closing chapter of this work.

(k) *Wambold v. Foote*, 2 Ont. App. 581.

(l) *Mallett v. Bateman*, L. R. 1 C. P. 170; 16 C. B. N. S. 543; 10 L. T. N. S. 869; 10 Jur. N. S. 865.

(m) *Gallager v. Brunel*, 6 Cow. 350; *Carville v. Crane*, 5 Hill, 484; *Smith v. Easton*, 54 Md. 138; *Wills v. Shinn*, 42 N. J. Law, 138; see § 63; *Rayne v. Terrell*, 33 La. Ann. 815.

(n) *Martin v. England*, 5 Yerg. 317.

(o) *Bushell v. Beavan*, 1 Bingham. N. C. 122; *Berryhill v. Jones*, 35 Ia. 339.

(p) *Thompson v. Blanchard*, 3 Comst. 335; *Bronson, J.*, diss.; *Doolittle v. Dinny*, 31 N. Y. 352; *Bildersee v. Aden*, 62 Barb. 179; 12 Abb. Pr. N. S. 324; citing *Johnson v. Ackerson*, 40 How. Pr. 222; *Johnson v. Noonan*, 16 Wis. 695; *Cody v. Filley*, 4 Col. 343; *Grinestaff v. The State*, 53 Ind. 240.

particular kind of security is not designated, but it must be either a recognizance taken by a justice, or at least a written engagement; otherwise it comes directly within the Statute of Frauds; here there appears to have been neither.(q) And it has been decided in Alabama that security for costs is a guaranty within the Statute of Frauds.(r)

§ 36. Where an attorney promises to pay the debt of his client, or costs due by the latter, the Statute of Frauds is not applied.(s) This is because, in a matter relating to its own officers, the court is satisfied with oral proof.

Guaranties
by an attorney.

§ 37. Before closing this branch of our subject, a few miscellaneous points may be noticed. Thus, a guaranty to be performed within a year must be evidenced by a writing.(t) In the cases in the note will be found dicta classifying such promises as are within the guaranty clause of the Statute of Frauds, and such as are not.(u) The following are a few examples of guaranties within the Statute of Frauds: a promise to pay the subscription of another to a church;(v) a promise to be responsible for the wages which a third person owes the plaintiff.(w) In a late New Jersey case in which one Shinn was the plaintiff, and George, William, and Moses Wills and others were defendants, the court said: "The case then against William Wills and Moses Wills is that they promised to go on a note to help refund to Shinn the amount he had paid for George Wills. Their promise therefore amounted to a promise to assist in refunding to Shinn a portion of the debt which George Wills owed Shinn by reason of his payment of the sum already men-

Some miscellaneous points and examples of invalid and valid oral guaranties.

(q) *McNutt v. Johnson*, 7 Johns. 19.

(t) *Gordon v. Ross*, 2 Cal. 156.

(r) *Bullard v. Johns*, 50 Ala. 383; see *Bloomington v. Heiland*, 67 Ill. 280; *Chaplin v. Allan*, Court Sess. Cas. 4 D. 616; 18 Scot. Jur. 250.

(u) *Skelton v. Brewster*, 8 Johns. 376; *Hodgkins v. Heaney*, 15 Minn. 194; *Harrington v. Rich*, 6 Vt. 666; *Jepherson v. Hunt*, 2 Allen, 421; *Furbish v. Goodnow*, 98 Mass. 297.

(s) *Payne v. Johnson*, cited in 1 Tyr. 283; *Senior v. Butt*, id.; *Evans v. Duncan*, id. See chap. on Validity. See *Files v. McLeod*, 14 Ala. 611; *Hedges v. Strong*, 3 Oreg. 18.

(v) *Catlett v. M. E. Church*, 62 Ind. 366.

(w) *Miller v. Neihaus*, 51 Ind. 403.

tioned with no benefit and consideration moving to the promisors. The promise was within the terms of the Statute of Frauds, and is therefore unenforceable.”(x) Where H. applied for goods to the plaintiff, and gave the defendant as a reference, and the defendant upon the plaintiff applying to him wrote the latter, “In reply to yours respecting Mr. H., . . . I will answer for the payment of goods sent him,” Lord Ellenborough said, “The goods were certainly sold to Hicks; the defendant’s undertaking is collateral, and ought to have been declared on specially.”(y) The following is an example of a plain guaranty: Where a subcontractor, who engaged that the owner of land would employ W. to build for him, that he, the subcontractor, would be responsible for the performance of the contract, and that W. should discharge his obligation and build the houses, so that no bills should be made to charge the buildings with liens, and that no liens should be allowed to be filed against the building if the work was let to W., it was held that the Statute of Frauds applied.(z) In the note will be found examples of guaranties within the Statute of Frauds.(a) In an early Ohio case a doubtful ruling was made: A written acknowledgment that the defendant’s claim against one S. M. shall be offset and applied to the plaintiff’s claim against the defendant is good evidence to establish a set-off, though the writing shows no consideration; the Statute of Frauds does not apply, it not being a guaranty, but the mere acknowledgment of a pre-existing liability.(b) In the note will be found examples of promises not within the guaranty clause of the Statute of Frauds.(c)

(x) *Wills v. Shinn*, 42 N. J. Law, 138. *Dearborn v. Parkes*, 5 Greenl. 81; *Griffin v. Derby*, 5 Greenl. 476; *Pike v.*

(y) *Mines v. Sculthorpe*, 2 Camp. 217. *Brown*, 7 Cush. 136; *Towne v. Grover*, 9

(z) *Abham v. Boyd*, 7 Daly, 31. *Pick*. 306; *Gardiner v. Hopkins*, 5

(a) *Steele v. Towne*, 28 Vt. 771; *Wend*. 23; *Brown v. Curtis*, 2 Comst. 225; *Johnson v. Gilbert*, 4 Hill, 178; *Youngs v. Shough*, 3 Green (S. C.), N. J. 28; *Durant v. Rogers*, 71 Ill. 124; *Quintard v. De Wolf*, 34 Barb. 97; *Belknap v. Bender*, 4 Hun, Sup. Ct. 414; *Bell et al. v. Bruen*, 17 Peter’s Rep. 168; *Walker v. McDonald*, 5 Minn. 461. *Cardell v. McNiel*, 21 N. Y. 336; *Jefferson Co. v. Slagle*, 66 Pa. St. 202; *Landis v. Rogers*, 59 Pa. St. 98; *Randle v. Harris*, 6 Yerger, 509; *Peck v.*

(b) *Hoover v. Morris*, 3 Hamm. 56. *Thompson*, 15 Vt. 637; *Walker v. Nor*

(c) *Reed v. Holcomb*, 31 Conn. 363; *ton*, 29 Vt. 226.

§ 38. The second general division of the present subject is the consideration of the promise, and how far it is a determining element in the question whether or not the Statute of Frauds applies in a given case. The mere fact that the consideration of the guaranty is a forbearance on the part of the promisee to proceed against the party answered for, will not make an exception to the statute.^(d) "Where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit," the Statute of Frauds, said Chief Justice Shaw, applies.^(e) In a case in 43 New Hampshire, the court said that, to except a promise from the statute, it is never sufficient that the promisee has agreed to allow time to the debtor;^(f) or to forbear to bring a suit against him for a time;^(g) or has discharged a suit against

II. THE CONSIDERATION OF THE PROMISE. Consideration of forbearance.

(d) *Fish v. Hutchinson*, 2 Wils. 34; *King v. Wilson*, 2 Stra. 873 (but see note); *Lee v. Bashpole*, Bull N. P. 281; *Rothery v. Curry*, cited in *Williams v. Leper*, Burrow, 1886, 2 Wilson K. B. 308; *Buller's Nisi Prius*, 281; *Kirkham v. Marter*, 2 B. & Ald. 613; *Lee v. Mitchell*, 23 U. C. Q. B. 315; *Bohannon v. Jones*, 30 Ga. 488; *Krutz v. Stewart*, 54 Ind. 181; *Westheimer v. Peacock*, 2 Iowa, 531; *Jones v. Walker*, 13 B. Mon. 359; *Walker v. Jones*, 10 West. L. Jour. (Ky.) 319; *Lieber v. Levy*, 3 Metc. (Ky.) 292; *Russell v. Babcock*, 14 Me. 138; *Hilton v. Dinsmore*, 21 Me. 410; *Doyle v. White*, 26 Me. 349; *Stewart v. Campbell*, 58 Me. 439; *Thomas v. Delphy*, 33 Md. 379; *Frank v. Miller*, 38 Md. 458; *Hodgkins v. Heaney*, 15 Minn. 194; *Tilston v. Nettleton*, 6 Pick. 509; *Stones v. Symmes*, 18 Pick. 467; *Price v. Weaver*, 13 Gray, 273; *Nelson v. Boynton*, 3 Metc. 401; *Musiok v. Musiok*, 7 Mo. 496; *Allen v. Thompson*, 10 N. H. 33; *Lang v. Henry*, 54 N. H. 59; *Watson v. Randall*, 20 Wend. 284 (distinguishing *Simpson v. Patten*, 4 Johns. 422; *Jackson v. Raynor*, 12 Johns. 291; *Smith v. Ives*, 15 Wend. 182); *Bennett v. Pratt*, 4 Denio, 275; *Doolittle v. Naylor*, 2 Bosw. 224; *Mallory v. Gillett*, 21 N. Y. 413; *Duffy v. Wunch*, 42 N. Y. 245; 8 Abb. Pr. N. S. 113; *Hearing v. Dittman*, 8 Phil. 307; *Britton v. Thraillkill*, 5 Jones Law, 330; *Durham v. Arledge*, 1 Strob. 5; *Caston v. Moss*, 1 Bailey, 14; *Caperton v. Gray*, 4 Yerg. 563.

(e) *Nelson v. Boynton*, 3 Metc. (Mass.) 400; see *Saxton v. Landis*, 1 Harr. (N. J.) 304; *Stewart v. Campbell*, 58 Me. 441; *Thomas v. Welles*, 1 Root, 57.

(f) *Robinson v. Gilman*, 43 N. H. 490; citing *Jackson v. Raynor*, 12 Johns. 291; *Smith v. Ives*, 15 Wend. 182; *Parker v. Wilson*, id. 343; *Watson v. Randall*, 20 id. 201.

(g) *Id.*, citing *Simpson v. Patten*, 4 Johns. 422; *Smith v. Ives*, 15 Wend. 182; *Watson v. Randall*, 20 id. 201; *King v. Wilson*, 2 Stra. 873; *Fish v. Hutchinson*, 2 Wils. 94; *Kirkham v. Marter*, 2 B. & Ald. 613; 1 Saund. 211, a; 10 N. H. 32.

him;(h) or has released to the debtor any lien;(i) or pledge, attachment, or levy.(j) And the same is true of any consideration which passes merely between the original debtor and the promisee, though at the request and for the accommodation of the promissor. A promise to pay a debt of a third person is not taken out of the Statute of Frauds because of the fact that the person answered for had property, which in reliance upon the guaranty the plaintiff allowed him to take out of the state, and though the promise was made in bad faith.(k) The abandonment of a levy by a judgment creditor on the goods of his debtor does not take out of the Statute of Frauds a promise of a third person to pay the debt.(l) When the benefit of the lien accrues to the promissor, the rule is different, as will be seen hereafter.(m) The following are a few examples of the present rule. Thus, where the defendant promises the sheriff that if he would not proceed with an execution against one S. he, the defendant, would pay the costs, the Statute of Frauds was held to apply, as the contract did not affect the plaintiff as to his lien, or delay him.(n) Where an attorney, holding certain funds, was served with an attachment by a creditor of the person to whom he was bound to account for the funds, and promised to pay the debt which was the foundation of the attachment, if the latter was withdrawn, it was held that the Statute of Frauds did not apply, as he might have been put to expense and trouble by the attachment, and might even have had a judgment entered against him personally.(o) Where there was a promise to answer for the rent of another for a quarter due, and a second quarter accruing, even if made on the consideration of forbearance to distrain for that due, is within the Statute of Frauds, as the contract is

(h) *Id.*, citing *Nelson v. Boynton*, 3 Met. 396; *Tomlinson v. Gill*, 6 A. & E. 564; *Rowe v. Whittier*, 21 Me. 545.

(i) *Id.*, citing *Mallory v. Gillett*, 21 N. Y. 412; *Fay v. Bell*, *Lalor*, 251.

(j) *Id.*, citing *Clancey v. Piggott*, 2 A. & E. 473; 20 Wend. 184; *Mercum v. Mack*, 10 Wend. 461; *Chater v. Becket*, 7 T. R. 201.

(k) *Gillfillan v. Snow*, 51 Ind. 308.

(l) *Stern v. Drinker*, 2 E. D. Sm. 406, citing and distinguishing several cases.

(m) *Vide* § 133.

(n) *M'Kinney v. Quilter*, 4 McCord, 410; distinguishing *Williams v. Leper*, and *Read v. Nash*, and relying on *Fish v. Hutchinson*.

(o) *Hedges v. Strong*, 3 Or. 18.

an entire one.(p) In a Scottish case, it was held that an oral promise that a debtor shall appear to an action, and that if he does not the promissor will answer for the debt, must be in writing, though the promisee stayed his suit in reliance upon the promise; the court seemed to have thought the engagement equivalent to bail.(q) There has been some authority for making the existence of a new consideration of forbearance a reason for taking a guaranty out of the Statute of Frauds. Thus, in an early English case, a promise in consideration of forbearance of action against A. that A. shall not leave the kingdom without paying the debt is *semble* not a guaranty within the Statute of Frauds, as there is new consideration. The breach laid was that A. had left the kingdom without paying.(r) So a promise by a debtor and the defendant that if the plaintiff would forbear his debt for a certain period, the debtor and the defendant would give their joint and several note therefor, was held to be an original promise and not a guaranty; the promise being in writing, no question of the Statute of Frauds arose.(s) Under the Scotch law, in cases where for informal contracts a writing is only necessary to prevent the obligee from disavowing the contract ("resiling") and to deprive him of his *locus pœnitentiæ*, such a part-performance ("*rei interventus*") as forbearance to the third person will allow the admission of oral evidence of the contract.(t) So where the sheriff delivered to the defendant in an execution the goods levied on, which one of the guarantors claimed, and the latter agreed to pay the sheriff, the plaintiff, a certain sum on account of the judgment in the suit in question, the Statute of Frauds was held not to apply.(u) So where the promisee surrendered the lien of an execution, though it did not appear that the lien enured to the promissor.(v) Where the corpora-

(p) Hall v. Denholm, 11 U. C. Q. B. 356; see Thomas v. Williams, 10 B. & C. 668; § 54.

(q) Chaplin v. Allan, Court Sess. Cas. 4 D. 616; 14 Scot. Jur. 250.

(r) Elkins v. Heart, Fitzg. 202.

(s) Ferris v. Barlow, 2 Aik. 108.

(t) Burge, Surety. 37; see *supra*, § 2.

(u) Lightle v. Berning, 15 Nev. 391.

(v) Mercein v. Andrus, 10 Wend. 461; and see generally, Stewart v. Campbell, 58 Me. 443; Russell v. Babcock, 14 Me. 138; Goolsby v. Bush, 53 Ga. 355; Stewart v. Hinkle, 1 Bond, 506. See §§ 131, 132, 133.

tion of which the defendant was president got the benefit of a relinquishment of a lien by the plaintiff, the Supreme Court of Indiana held that the Statute of Frauds did not apply, on the broad ground that there had been forbearance given to the person answered for.^(w)

§ 39. Where the forbearance is shown to a promissor who has an interest in the property against which the promisee forbears to proceed, another principle applies, viz., that a promise to pay a debt which attaches to the promissor's own property, is not a guaranty, though the debt in the first instance is that of a third person. It is not always easy to distinguish cases of this class, which will be considered hereafter, from those of a somewhat different category, which will be treated of now, viz., those in which the guarantor's promise is not within the Statute of Frauds, because he has been put in funds in order to meet it; it is often difficult to ascertain from a reported decision whether the property held by the guarantor is his own property threatened with a proceeding for the debt of another, or whether he happened to have property of the third party in his hands, and in consideration thereof promised to pay a debt of such third party, or whether he was specially put in funds in order to answer such debt. It may, however, be stated as a broad rule, that a guaranty in consideration of funds of the third person in the hands of the guarantor is not within the Statute of Frauds.^(x) It has been thought that

Guaranty
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eral rule.

- (w) *Spooner v. Dunn*, 7 Ind. 81. *v. Murphy*, 23 Minn. 6; *Stariha v. Greenwood*, 28 Minn. 522; *Dilts v. Parke*, 1 South, 219; *Hetfield v. Dow*, 3 Dutch. 446; *Skelton v. Brewster*, 8 Johns. 376; *Ohnstead v. Greene*, 18 Johns. 12; *Ellwood v. Monk*, 5 Wend. 235; *Watson v. Randall*, 20 Wend. 204 (distinguishing *Simpson v. Patten*, 4 Johns. 422; *Jackson v. Raynor* 12 Johns. 291, as being within the present category; and also *Smith v. Ives*); *Tisdale v. Morgan*, 7 Hun, 585; *Mallory v. Gillett*, 21 N. Y. 413; *Hicks v. Critcher*, Phill. (N. C.) 353; *Draughan v. Bunting*, 9 Ired. 10; *Jenkins v. Peace*,
- (x) *Walker v. Taylor*, 6 Car. & P. 753; *Goddard v. Mockbee*, 5 Cranch C. C. 666; *McKenzie v. Jackson*, 4 Ala. 230; *Drakely v. DeForest*, 3 Conn. 272; *Morgan v. Overman Mining Co.*, 37 Cal. 537; *Eddy v. Roberts*, 17 Ill. 505; *Williams v. Corbet*, 28 Ill. 263; *Walden v. Karr*, 88 Ill. 51; *Nelson v. Hardy*, 7 Ind. 367; *Woodward v. Wilcox*, 27 Ind. 214; *Raymer v. Sim*, 2 Hen. & McH. 454; *Steadman v. Guthrie*, 4 Metc. (Ky.) 152; *Hilton v. Dinsmore*, 21 Me. 410; *Todd v. Tobey*, 29 Me. 219; *Stewart v. Campbell*, 58 Me. 439; *Sullivan*

the fact of a new consideration moving to the promisor determines the validity of the oral guaranty, and that this rule includes the "Funds" rule, and is more comprehensive.^(y) As will be seen in a later section, there prevails a still unsettled controversy as to this wider doctrine. The following are some statements of the "Funds" rule: Thus it has been said that the result of the cases would seem to be that if the defendant had received a valuable consideration for the purpose from either party, distinct from and independent of that of the original debt, and *thereupon* had promised payment, it would be an original undertaking, and not necessarily to be evidenced by writing, as in the case of being furnished with funds for the purpose of paying the debt; or where the plaintiff having a lien upon property to secure his debt relinquished it to the benefit of the person promising to pay it.^(z) In this case what the fund was does not appear; but the guarantor gave as his reason for making the guaranty that he had property of the third person in his hands. In the case in 43 New Hampshire there will be found the following excellent classification of the cases arising under the "Funds" rule, and rules cognate to it. The court said, in the following cases, the promise has been held binding without writing: (1) Where the debtor has put into the hands of the promisor the amount of the debt;^(a) or transferred to him property equivalent;^(b)

1 Jones's Law, N. C. 416; Jack v. Morrison, 48 Pa. St. 113; Stoudt v. Hine, 45 Pa. St. 31; Whitcomb v. Kephart, 50 Pa. St. 85; Clymer v. DeYoung, 54 Pa. St. 118; Justice v. Tallman, 86 Pa. St. 149; 5 W. N. C. 90; Madden v. McCray (or McCray, adm. v. Madden), 1 McCord, 487; Hindman v. Langford, 3 Strob. 207; Hilton v. Duncan, 1 Cold. 313; Hall v. Rodgers, 7 Hump. 536; National Bank v. Kinner, 1 Utah, 102; Wait v. Wait, 28 Vt. 350. See § 140.

(y) See Mason v. Wilson, 84 No. Car. 51.

(z) Hilton v. Dinsmore, 21 Me. 413; citing Russell v. Babcock, 14 Me. 138,

as a "funds" case, and denying the rule there laid down by Judge Emery, viz., that a guaranty in consideration of forbearance is not within the Statute of Frauds.

(a) Robinson v. Gilman, 43 N. H. 491; citing Hilton v. Dinsmore, 21 Me. 413; Lawrence v. Fox, 20 N. Y. 268; Blunt v. Boyd, 3 Barb. 209, Harris, J.

(b) Id., citing Skelton v. Brewster, 8 Johns. 376; Gold v. Phillips, 10 Johns. 412; Farley v. Cleaveland, 4 Cow. 432; S. C., 9 Cow. 639; Elwood v. Monk, 5 Wend. 235; Barker v. Bucklin, 2 Denio, 45; Pike v. Brown, 7 Cush. 136; Alger v. Scoville, 1 Gray, 396; Preble v. Baldwin, 6 Cush. 552;

or something of equivalent advantage to himself, as a license to keep a public house; *(c)* or where the promisee has transferred or released to the promissor some interest in the property of the debtor, *(d)* as a lien given by law to the seller for the price of goods sold, but not delivered; *(e)* or to a landlord upon the goods of his tenant for rent; *(f)* or a bailee for services; *(g)* or of an insurance agent on policies in his hands; *(h)* or where the promisee has released to the promissor and holder of the property an attachment; *(i)* or where he has released to the promissor the right to attach the property of the debtor; *(j)* or to bring a suit in the admiralty to enforce a lien; *(k)* or to bring a trustee suit against a party having funds of the debtor in his hands. *(l)*

§ 40. Where the guarantor has a fund he is regarded as agent of the third person to pay the debt. *(m)* It has been said that the "Funds" exception rests on the theory of purchase, so that the promise is to pay the price of property, acquired by the promissor, the payment of promisee's debt being only incidental. *(n)* But it has been thought that the goods in the hands of the

General
points as
to the
"Funds"
rule.

Todd *v.* Tobey, 29 Me. 224; Dearborn *v.* Parks, 5 Me. 83; Bird *v.* Gammon, 3 Bing. (N. C.) 883; Browning *v.* Stal-lard, 5 Taunt. 450; Wait *v.* Wait, 28 Vt. 350; Olmstead *v.* Greenley, 18 Johns. 12; Meech *v.* Smith, 7 Wend. 317; Gardner *v.* Hopkins, 5 Wend. 23; King *v.* Despard, 5 Wend. 277; Whitbeck *v.* Whitbeck, 9 Cow. 266.

(c) Id., citing Walker *v.* Taylor, 6 C. & P. 752.

(d) Id., citing Barrett *v.* Trussell, 4 Taunt. 17; Tomlinson *v.* Gill, Ambler, 330.

(e) Id., citing Fitzgerald *v.* Dressler, 5 C. B. (N. S.) 893.

(f) Id., citing Williams *v.* Leper, 3 Burr. 1886; Slingerland *v.* Morse, 7 Johns. 463; Thomas *v.* Williams, 10 B. & C. 679; Edwards *v.* Kelly, 6 M. & S. 204; Bampton *v.* Paulin, 4 Bing. 264; Stephens *v.* Pell, 2 C. & M. 710.

(g) Id., citing Houlditch *v.* Milne, 3 Esp. 86; Mallory *v.* Gillett, 7 Smith, 412.

(h) Id., citing Castling *v.* Aubert, 2 East, 325.

(i) Id., citing Cross *v.* Richardson, 30 Vt. 642.

(j) Id., citing Lampson *v.* Hobart, 28 Vt. 697.

(k) Id., citing Fish *v.* Thomas, 5 Gray, 45.

(l) Id., citing Cross *v.* Richardson, 30 Vt. 642; and saying "the last seeming to us to stand on the same grounds as the cases of Lampson *v.* Hobart and Fish *v.* Thomas." . . .

(m) Stoudt *v.* Hine, 45 Pa. St. 31; Watson *v.* Gray, 4 Keyes, 395.

(n) State Bank *v.* Mettler, 2 Bosw. 396; citing Jackson *v.* Raynor, Farley *v.* Cleveland, Ellwood *v.* Monk, Johnson *v.* Gilbert, Barker *v.* Bucklin.

guarantor must become the property of the latter, and that a mere consignment subject to draft is not alone sufficient to take the consignee's guaranty out of the Statute of Frauds. See, *infra*, § 55, etc.(o) In a New York case, where the plaintiff and defendant were both creditors of the same person, it was said that merely buying a claim against a third party will not make the contract any the less a guaranty if the original debtor continues liable; but where the defendant is put in funds by the debtor, and under the agreement the latter is to be discharged, then defendant's promise to pay the plaintiff the debt due him is not a guaranty within the Statute of Frauds.(p) It has been thought, too, that the receipt by the defendant, from the debtor answered for, of a consideration sufficient to cover the debt guaranteed, will not alone take the promise out of the statute; but that this consideration must have been especially made a fund out of which the guaranty was to be met, and to which the liability was to be confined; but see *infra*.(q) Whether the fund comes from the plaintiff or the original debtor seems immaterial.(r)

§ 41. On the point whether the promisee must give up his original claim on the person answered for, there is some contradiction in the cases. It may be said that if he must do so there is no value in the "Funds" rule, because if the original debtor is discharged it is clear that the Statute of Frauds is satisfied at any rate, because in such a contract there are but two parties, the promissor and the promisee; and there is no collateral feature in the matter. It has been decided expressly that the original debtor may remain liable, and yet the oral guaranty be valid if the guarantor has a fund,(s) and this is implied in most of the cases cited above, § 39. It will, however, be seen later that the tendency of a strong current of authority is to

Whether the original claim must be given up.

(o) *Id.*(r) *Clymer v. De Young*, 54 Pa. St.(p) *Tisdale v. Morgan*, 7 Hun, 585; 119.

citing cases.

(s) *Maule v. Bucknell*, 50 Pa. St. 50;(q) *Furbish v. Goodnow*, 98 Mass. 297; relying upon *Jackson v. Raynor*, and denying the late law of New York, Maine, and Vermont.*Dock v. Boyd*, 93 Pa. St. 93; 8 W. N. C. 139; *Small v. Schaefer*, 24 Md. 156. See *Sweatman v. Parker*, 49 Miss. 26. See § 57.

make the non-liability of the party answered for the exclusive test.(t)

§ 42. Under a rule to be treated of later, viz., that a promise of guaranty made to the original debtor and not to the latter's creditor, it is an important question whether or not the creditor can sue, or whether this right belongs exclusively to the debtor (see § 81). It would seem that where the guarantor has funds it is immaterial to whom the promise is made, and that the creditor can sue, the promise being for his benefit, and the funds being held in a quasi trust.(u) In a Connecticut case, however, it has been denied that the creditor can sue; and it has been said that it was only between the guarantor and the party answered for, who had given the latter funds, that the Statute of Frauds did not apply.(v) In a North Carolina case it was said that the creditor could not sue unless there had been a novation.(w) Where the fund was assigned by the maker of a note, and in consideration thereof the first and second endorser agreed to pay the note, the new agreement was held to alter the relations of the latter, and the second endorser could not recover from the first what he had been obliged to pay on the note, their positions under the new contract being equal.(x) Where X. held a note given by the plaintiff and one Y., and held certain cotton as collateral security, and these persons agree that the defendant shall substitute his note for the original one, and shall have the cotton, the defendant took the cotton but would not give his note; it was held that the plaintiff having

(t) See *Furbish v. Goodnow*, 98 Mass. 297; and see *Jackson v. Raynor*, 12 Johns. 291, and *Stone v. Justice*, 9 Phila. 22. See *Turner v. Hubbell*, 2 Day, 459, explaining *Williams v. Leper*, Burr. 1886; as going on the ground that the person answered for was discharged; *Simpson v. Nance*, 1 Spear, 7; *Langford v. Freeman*, 60 Ind. 50.

(u) *Townsend v. Long*, 77 Pa. St. 146, and this though in Pennsylvania the creditor cannot sue on an oral promise of guaranty made to the debtor. See *Goodwin v. Bowden*, 54 Me. 425;

Stariha v. Greenwood, 28 Minn. 522; *Kirtland v. Hoole*, 8 N. Y. Week. Dig. 274 (N. Y. S. C.); *Schindler v. Ewell*, 45 How. Pr. 34; *Stilwell v. Otis*, 2 Hilt. 149; *State Bank v. Mettler*, 2 Bosw. 396; *Claflin v. Ostrom*, 54 N. Y. 584; *Burkham v. Mastin*, 54 Ala. 125. See *Tomlinson v. Gill*, 1 Ambl. 330. See *infra*, § 116.

(v) *Clapp v. Lawton*, 31 Conn. 100.

(w) *Styron v. Bell*, 8 Jones, 225.

(x) *Westfall v. Parsons*, 16 Barb. 648.

paid the first note, could obtain the amount from the defendant.^(y)

§ 43. The examples of guaranties given in consideration of funds are very numerous, and not easy to classify. It will be well to arrange them, for the sake of convenience, in several arbitrary divisions, which will, at least, serve to assist the memory of the reader.

Examples
of the
"Funds"
rule.

The following are a few general examples: Thus, where a person to whom funds have been remitted to be paid the plaintiff, promises to pay the amount due the latter by the person remitting the money, the Statute of Frauds does not apply.^(z) So where cattle in charge of W., the agent of an undisclosed owner, were transported by the plaintiff, who only gave them up to the defendant upon his agreeing to pay the freight due, and the defendant, by an arrangement with W. sold some of the cattle and held the proceeds, the Statute of Frauds did not apply;^(a) and so where an agent, holding funds of a debtor and liable to account to him therefor, agrees, under the direction

(y) *Hindman v. Langford*, 3 Strob. Law, 209.

(z) *Wyman v. Smith*, 2 Sandf. 335. Another example will be found in *Mills v. Mills*, and *Young v. Roberson*, 3 Head, 710, where the facts were as follows: One James T. Mills having a certain claim of a thousand dollars, conveyed it by deed to Wilkinson. Mills afterwards assigned the same claim to Young, the plaintiff, who paid cash and gave notes for it. Mills endorsed the notes to Martha A. Roberson, the defendant. To induce Young to pay the notes, which, owing to the previous assignment were possibly valid, or possibly invalid, and were then in litigation, and were without consideration, Martha A. Roberson surrendered the notes to him, and guaranteed that he should realize out of the claim above described the sum of \$920; in consideration of this he paid her \$325. The court relied upon the "new consideration" rule,

but also acknowledged that it came rather under that of a promise upon the inducement of receipt of funds, saying: "Here Young was not bound to pay these notes, the consideration having entirely failed, by means of the superior title of Wilkinson, the trustee. He had a perfect legal right to withhold the money, which was as much his own as if the trade had never been made, or the notes given. He is induced to yield this right in consideration of the guarantee. It is in principle like *Williams v. Leper*."

It will have been noticed that the funds in this case consisted merely of a sum of money paid by the plaintiff to the defendant; there is room for doubt as to whether the rule allowing such a consideration to be ground for sustaining an oral guaranty will not give a wide opening for an evasion of the statute.

(a) *New York R. R. v. Gilchrist*, 16 How. Pr. 564.

of the latter, to pay the latter's debts to the plaintiff;(b) so where goods were supplied to a third party, who settled with the defendant therefor, and the latter undertook that the plaintiff should be paid for them.(c) So where a debtor conveys his land as a gift or advancement to his sons, and they assume the debts, the Statute of Frauds does not apply: it is the same to pay the father, or, at his request, his creditors.(d) Where the defendant promised the plaintiff to pay for goods supplied by the latter to defendant's cropper (or tenant), and afterwards, having received the crop, promised plaintiff directly to pay him, it was held that the Statute of Frauds did not apply.(e) Where a third person represented that he had in his hands sufficient property of a debtor, which he intended to sell, in consideration that the creditor would extend the time of payment, promised the latter by parol that he would sell the debtor's property and pay him, and that it would sell for enough, it was held, that neither promise was to pay a debt of another, or within the Statute of Frauds.(f) Where the plaintiff agreed to board a clergyman upon a promise by the defendant to pay for the board, the latter assuring the plaintiff that he had funds in his hands belonging to the society whose minister the clergyman was, the Statute of Frauds did not apply: it also appeared that the plaintiff looked solely to the defendant.(g) So where the defendants out of a fund in their control promised to pay for the board of their employés, and with the latter the plaintiff made no contract.(h) So where the defendant was owner, and a third person the principal contractor, building for the defendant, and the plaintiff was a sub-contractor, and the defendant assured the plaintiff that he had funds due the principal contractor, and would thereout pay the plaintiff's claim.(i)

(b) *Goodwin v. Bowden*, 54 Me. 425.(c) *Watkins v. Sands*, 4 Bradw. 209.(d) *Swihart v. Shaum*, 24 O. St. 436;see *Lucas v. Payne*, 7 Cal. 96.(e) *Threadgill v. McLendon*, 76 No.

Car. 26.

(f) *Lippincott v. Ashfield*, 4 Sandf.

(Law) 614.

(g) *Bushee v. Allen*, 31 Vt. 634.(h) *Chicago, etc., Co. v. Liddell*, 69

Ill. 640.

(i) *Hiltz v. Scully*, 1 Cinc. 557; but see *Weyer v. Beach*, 14 Hun, 237.

§ 44. The first, and perhaps most important category of guaranties in consideration of property held by the guarantor, is that which contains such promises made under the fear of an execution at law. That forbearance alone of the third party will not take the promise out of the Statute of Frauds has already been seen (see § 38); and that the benefit accruing to the promisor of a lien surrendered by the promisee will make an exception to the statute, will be seen later. Where the promisor holds the property and gives the guaranty to obtain a forbearance, which enures to his own advantage, the rule is well established that the Statute does not apply; and in *Williams v. Leper*, the leading case on this point, the law was first clearly announced. It was there held that where the defendant, a broker, selling the goods of a debtor for the benefit of the latter's creditors, promised the debtor's landlord, the plaintiff, that if he will not distrain, he, the defendant, will pay the tenant's debt to the plaintiff, the Statute of Frauds does not apply.^(j) So where the defendant as agent of the tenants of land was employed by them to sell goods thereon, promised the landlord, who was about to distrain on their goods, which were distrainable, that if he would not do so, he, the defendant, would pay the rent due, it was held that the Statute of Frauds did not apply.^(k) A threat of execution may be enough to make an oral guaranty in consideration of the forbearance thereof valid. Thus where the promisor was threatened with a suit by the promisee, who proposed showing that the former had no right to the property held by him, and was not a creditor of the real owner, while he, the promisee, was such a creditor, the Statute of Frauds did not apply to an engagement to answer for the debt with which it was sought to charge the property.^(l) So the

Promise in consideration of receipt of goods levied on.

(j) *Williams v. Leper*, 2 Wils. 308; to relinquishment of the opportunity Burr. 1886; see *Bird v. Gammon*, 3 for a lien. Bingham. N. C. 888; *Houlditch v. Milne*, 3 Esp. 87.

(k) *Bampton v. Paulin*, 12 Moore, 499; 4 Bingham. 264; and see § 135, as (l) *Smith v. Rogers*, 35 Vt. 145; see *Williams v. Leper*, cited to a like effect in Selw. N. P. (7th Am. ed.) p. 853; see *Robinson v. Gilman*, 43 N. H. 490; *Mitchell v. Griffin*, 58 Ind. 560.

Statute of Frauds did not apply where the plaintiff, as landlord, had distrained on goods of one T. E., whereupon the defendant by a writing, which showed no consideration, agreed to pay him all the rent due him, the plaintiff, from T. E., and parol evidence was offered that the consideration was the surrender of the distress to the defendant.^(m) Where the plaintiff, who had distrained on the goods of A., delivered them to the defendant, who signed on the back of an inventory of them the following statement: "We do hereby promise to deliver to Peter Slingerland all the goods contained in the within, etc., or pay the said Peter \$450," it was held that the promise not being within the Statute of Frauds, the consideration did not require to be stated.⁽ⁿ⁾ Where the plaintiff, relying on the defendant's guaranty, discharged one H., whom he had arrested, and the defendant had received from H. goods out of which he promised to pay the debt due the plaintiff, the Statute does not apply.^(o)

§ 45. So where the plaintiff, under a judgment against D., having levied on, sold, and bought in hay, etc., on a farm of which D. was the tenant and the defendant the owner, the latter's promise to pay the judgment if the plaintiff would not remove the hay, is not within the Statute of Frauds.^(p) So a promise by one whose goods were levied on to pay the execution creditor the proceeds of the goods when sold by the promissor if the levy be released, is not

^(m) *Edwards v. Kelly*, 6 M. & S. 208; it was held that the case was ruled by *Williams v. Leper and Read v. Nash*, 1 Wils. 305. Bayly, J., thought this a stronger case than *Williams v. Leper*, inasmuch as here was an actual delivery which suspended the tenant's debt, so that there was no outstanding liability. Abbott, J., said that *Williams v. Leper* was recognized in *Houlditch v. Milne and Castling v. Aubert*, 2 East. 330. Holroyd, J., regarded the tenant's debt suspended. See *Hall v. Denholm*, 11 U. C. Q. B. 356.

⁽ⁿ⁾ *Slingerland v. Morse*, 7 Johns.

463; see *Mercein v. Andrus*, 10 Wend. 461; *semble*, that a complaint which sets out the fact that the defendant knew of and assisted in the removal of certain property levied upon by the plaintiff, and that the defendant afterwards promised to pay to the plaintiff the third person's debt for which the levy had been made, discloses an agreement not within the Statute of Frauds; *Hilliard v. Austin*, 17 Barb. 141.

^(o) *Colwell v. Harison*, Livings. Jud. Opin. 40 (Mayor's Ct. N. Y.).

^(p) *Cooper v. Wait*, 8 N. Y., W. Dig. (S. C. N. Y.), 367.

within the Statute, the levy being valid, otherwise the levy being invalid.(g) Where the defendant, Robinson, having had an attachment by other parties issued against him, and having been unwilling to answer fully the interrogatories, promised the plaintiff, Gilman, who was about to issue an attachment, to pay the debt which was the subject of the attachment, the court held that the Statute of Frauds did not apply, and said that "Rollins, the debtor, was no party to the negotiation, and the benefit to be derived from Gilman's omission to sue was wholly Robinson's. He was assumed by Gilman to have in his hands property or funds for which he might be charged as the trustee of Rollins. If he had such funds, or property, and of sufficient amount to pay Gilman's debt, the waiver of Gilman of his right to commence a trustee suit would form such a consideration of his promise as would make it valid without writing, according to the principles adopted by the authorities. The promise to pay the debt was an admission, or might be regarded as an admission by the jury, that he had property for which he might be chargeable to the amount of these notes."(r)

§ 46. Where the plaintiff, a court officer, delivered to the defendant certain articles, which he had attached, the defendant gave a signed memorandum, reciting the fact and describing the goods, and promising to return them, it was held that whether the memorandum was sufficient or not, the Statute of Frauds did not apply.(s)

Further
examples.

(g) Rogers v. Collier, 2 Bailey, 583.

(r) Robinson v. Gilman, 43 N. H. 490, citing Jackson v. Raynor.

(s) Marion v. Faxon, 20 Conn. 494.

Where one Thos. McCray, the defendant, stated that he had effects of J. McC., as his security, and for the payment of J. McC.'s debts, and promised the plaintiff's agent that if he would forbear for a certain time to attach these effects, he, the defendant, would pay the debt (a note), the Statute of Frauds did not apply; McCray v. Madden, 1 McCord, 487.

Where the plaintiff, a sheriff, who

had levied upon a horse belonging to one Slappy, and being about to sell, was induced by Shiver, whose administrator the defendant is, not to do so, promising that if the plaintiff would leave the horse with Slappy, and not sell, he, Shiver, would pay the amount due on the *fi. fa.*, and the plaintiff paid the execution-debt and let Slappy have the horse, who delivered it to Shiver, who sold it; the plaintiff then called upon Shiver to pay, which he promised to do. It was held that while the original promise was within the Statute of Frauds, the second one was

Where the promissor held goods of the party answered for, and was interested in them, his guaranty on consideration of forbearance by the promisee to attach these goods, is not within the statute.^(t) It sometimes occurs that the guarantor, who is threatened with an execution, or who, without waiting for this, makes the guaranty, has been chosen by the original debtor as assignee to settle some or all of the obligations of such debtor: this class of cases will be found in § 52.

§ 47. In many cases the guaranty of the debt is by way of payment for property bought by the guarantor from the person to whom the guaranty is given; and this principle is treated in a later section (§ 115). Some instances of its application to promises, which in another aspect are those in consideration of funds, may here be given. Thus where a plaintiff who held policies of insurance as security for debts due him by G., the defendant's principal, surrendered these policies to the defendant, who promised to take care of certain bills, drawn on the plaintiff by G. and accepted by the plaintiff, the Statute of Frauds was held not to apply, the "Funds" rule and the "Purchase" rule being relied on.^(u) And so where the defendant bought the stock in trade of one H., for whom the plaintiff had given a written guaranty, and promised the plaintiff to pay this guaranty, and the plaintiff had to pay H., he can, notwithstanding the Statute of Frauds, recover from the defendant.^(v) Where the defendant signed a receipt to a levying officer conditioned to deliver up the goods or pay the execution, parol evidence is admissible of a declaration of the defendant, made when refusing to comply with a demand for the goods, that he would keep them and pay the execution, the Statute of Frauds does not apply; the evidence was only

not, as the defendant had been put in funds to pay the debt which Slappy owed the plaintiff, who had on his behalf paid it to the execution creditor; *Bohannon v. Jones*, 30 Ga. 488.

^(t) *Mitchell v. Griffin*, 58 Ind. 560.

^(u) *Castling v. Aubert*, 2 East, 330; *Borchsenius v. Canutson*, 100 Ill. 92.

^(v) *Todd v. Tobey*, 29 Me. 222; it will be noticed that the promise was really made to the debtor, and thus another exception, as laid down in *Eastwood v. Kenyon*, applies; see *infra*, § 76.

to show which alternative given by the receipt he chose to adopt.^(w)

§ 48. Where the defendant received a conveyance of property belonging to the party answered for, and promised to pay for a barn erected thereon by the plaintiff, the Statute of Frauds was held not to apply, and the "Funds" exception was relied on.^(x) Where the guarantor becomes the owner of property of the party answered for, his guaranty is to some extent one coming within the "Funds" rule, and is valid, though oral. Thus the promise by a buyer of property to pay a workman's claim.^(y) Where the guarantor receives the goods for the price of which the notes guaranteed by him were given, the Statute does not apply.^(z)

Subject
continued.

§ 49. The property held by the guarantor may be in the nature of collateral security, or commercial paper, or other evidences of liability, and for the proceeds of which the guarantor must account. Thus where the defendant, having received from a creditor the securities held by the latter for the debt, promises the creditor to pay the debt, the Statute of Frauds does not apply.^(a) Where the plaintiff, one of the makers of a note, had to pay it, and claimed reimbursement from the defendant into whose hands the proceeds of the note went, and to the benefit of whose property they were applied, a promise by the defendant to sign the note and pay it can be orally proved, and the

Promise by
holder of
collateral
security.

^(w) *Bowen v. Culp*, 36 Mich. 225.

^(x) *Wait v. Wait*, 28 Vt. 351; see *Huber v. Ely*, 45 Barb. 170; see *Lucas v. Payne*, 7 Cal. 96; *Hoile v. Bailey & McCulloch*, 17 N. W. Rep. 322 (S. C. Wis.).

^(y) *Rhodes v. Matthews*, 67 Ind. 131; *Landis v. Royer*, 59 Pa. St. 98; *McKeenan v. Thissel*, 33 Me. 368; *M'Donnell v. Cook*, 1 U. C. Q. B. 544; *McDonald v. Glass*, 8 U. C. Q. B. 245; *Tumblay v. Meyers*, 16 U. C. Q. B. 145; see § 115 *et seq.*

^(z) *McCreary v. Van Hook*, 35 Tex. 639; see *Cailleux v. Hall*, 1 E. D. Sm.

6; *Clymer v. De Young*, 54 Pa. St. 119; *Hedges v. Strong*, 3 Oreg. 18. See as further examples of a guaranty assumed by the guarantor as the price of property bought by him, § 115 *et seq.*; and see *Earle v. Crane*, 6 Duer, 569; *Wilson v. Bevans*, 58 Ill. 234; *Browning v. Stallard*, 5 Taunt. 450; *Griffin v. Derby*, 5 Greenl. 476; *Lucas v. Payne*, 7 Cal. 96; *Bishop v. Stewart*, 13 Nev. 35; *Cohen v. Hart*, 2 Hill (So. Car.), 306; *Cameron v. Clarke*, 11 Ala. 263.

^(a) *Gerow v. Clark*, 9 U. C. Q. B. 223, citing cases.

plaintiff can recover, notwithstanding the Statute of Frauds.(b) So a promise by one who receives a bond and mortgage of land, that as a consideration therefor he will pay a certain promissory note, is not within the Statute of Frauds.(c) So a promise to collect the amount of notes left by a third person with the promissor under a direction to pay the proceeds to the promisee.(d)

§ 50. And where the guarantor is indebted to or holds a fund belonging to the plaintiff's debtor, and promises to make the payment directly to the plaintiff, the Statute of Frauds does not apply. Thus a guaranty given by the owner of a building to a workman employed by the guarantor's contractor is valid, though by parol, the owner not yet having paid the contractor what he owed the latter;(e) especially where the workman or other creditor of the contractor trusted the latter, in the first instance, in reliance upon the guaranty.(f)

§ 51. Another category of cases arising under the "Funds" rule, and which, like others already noticed, may be considered to come within the principle that a promise to pay a debt which is really the guar-

(b) *Potter v. Brown*, 35 Mich. 279.

(c) *Kirtland v. Hoole*, 8 N. Y. Week. Dig. 274 (N. Y. S. C.).

(d) *Prather v. Vineyard*, 9 Ill. 48. So where T. & H., owing a note to the plaintiffs, sent to the defendants a note of their own endorsed for a larger amount, and this note was discounted by the defendants, it was held that the Statute of Frauds did not apply to a promise by the defendants, in consideration of the above, to pay the note which T. & H. owed the plaintiffs; *May v. National Bank of Malone*, 9 Hun, 111; see *Meyer v. Hartman*, 72 Ill. 444. So where the complainant and the defendant were endorsers of three notes of S. B., the primary liability on two of them being in the defendant, and on the third in the complainant, S. B. gave written orders on the city

authorities of Newark to pay to the defendants what was due him, S. B., by the city under a certain contract: parol evidence that these funds were agreed to go in payment of the three notes was admissible, notwithstanding the Statute of Frauds; *Price v. Trusdell*, 28 N. J. Eq. 201; see *Winfield v. Potter*, 10 Bosw. 230; 24 How. Pr. 446; *Pennell v. Pentz*, 4 E. D. Sm. 642; *Hayward v. Gunn*, 82 Ill. 390; see *Westfall v. Parsons*, 16 Barb. 648.

(e) *Nelson v. Hardy*, 7 Ind. 367; *Cock v. Moore*, 18 Hun, 32; *Booth v. Heist*, 94 Pa. St. 177; *Whitcomb v. Kephart*, 50 Pa. St. 85; see also *Balliet v. Scott*, 32 Wis. 176; see § 140 *et seq.*

(f) *Andrews v. Smith*, 2 Cr. M. & R. 631; *Estabrook v. Gebhart*, 32 Ohio St. 420.

antor's own, though in form a guaranty, is not within the Statute of Frauds, is that of a guaranty of a firm debt given by one who has become owner or holder of the partnership assets.^(g) (See § 121.) Where it was claimed that a partner's promise was to answer for the debts of third persons to the firm, the court said: "If, on a close of partnership affairs, one partner is allowed to take for his own use a part of the assets, whether choses in action, or anything else, on an agreement with his co-partners to account to them for a definite share, it is a separate and direct agreement on a new consideration. It becomes to the other partners then a matter of indifference whether the debts are collected or not. They belong to the partner taking them, and he may collect them or use them in trade or to satisfy his own individual debts, or he may release them wholly. It amounts to nothing more or less than a purchase of the interest of others in property belonging to them jointly. The Statute of Frauds has no application."^(h)

§ 52. Another category of cases is that in which the guarantor is an assignee of the property of the person answered for under a trust to pay the debts of the latter. The promise under these circumstances is not within the Statute of Frauds.⁽ⁱ⁾ Especially where it had been agreed that without the plaintiff's assent the assignment should not be recorded, and the promise was in consideration of such assent given.^(j) So a promise by preferred creditors in consideration of receiving all the assets to pay the expense of drawing the assignment, and this though the assignee remained liable for this charge.^(k) Where the

Promise by
assignee for
benefit of
creditors.

(g) *Townsend v. Long*, 77 Pa. St. 146; *Vanners v. Dubois*, 64 Ind. 338 (the defendant in these cases was a partner who had bought out his partner); *Clapp v. Lawton*, 31 Conn. 100; *Lee v. Fontaine*, 10 Ala. 764; *Raymond v. McCabe*, 9 Chic. Leg. News, 215 (S. C. Ill.) (the plaintiff also forbore to attach); see *Hayward v. Gunn*, 82 Ill. 390.

(h) *Conger v. Cotton*, 37 Ark. 297; *Poole v. Hintrager*, 14 N. West. Rep.

223 (S. C. Ia.); see *Wagner v. Egleston*, 49 Mich. 222.

(i) *Hughes v. Stringfellow*, 15 Ala. 327.

(j) *Jones v. Hardesty*, 10 G. & J. 405.

(k) *Stilwell v. Otis*, 2 Hilt. 149. So a promise by one receiving an assignment of the goods from the assignee for the benefit of creditors to pay the debts of the assignor is not within the Statute of Frauds; *Fisher v. Wilmoth*, 68 Ind. 450; see *Drakely v. Deforest*, 3 Conn. 277.

plaintiff sued as assignee of the certificate of stock in the Greenwich Company, an incorporated association, and averred that the assets of the company had been sold, and the proceeds delivered to the defendant as treasurer of the company, and that defendant had promised to pay over the fund to the shareholders at the rate of \$189.96 per share, it was held an original promise by the defendant and one enuring to every shareholder and creditor, entitling them to sue.^(l) Where an assignee agreed with his co-assignee, the plaintiff, to convey certain property to the defendant, if the latter would pay to the plaintiff a certain sum previously collected by one H. for the assigned estate, the Statute of Frauds does not apply.^(m) And so, where the defendant, who was a creditor of one R., agreed to take control of the latter's plantation and get in the crops and pay debts of his, contracted with the working of the plantation, and pay himself from the profits, and on this promise a creditor of R. may sue.⁽ⁿ⁾ Where the promise is in favor of one special creditor, the rule under the principle now under consideration is the same.^(o)

§ 53. A promise by an administrator, etc., or guardian, who holds assets, if not within the special clause of the Statute of Frauds, relating to administrators, executors, etc., is valid under the "Funds" exception to the guaranty clause. Thus a promise to the widow of an intestate, that if she would permit the defendant to become administrator he would make up any deficiency of

(l) *Therasson v. McSpedon*, 2 Hilt. 3. Where one bought the claim due an insolvent, a promise to pay a certain dividend to the creditors of the latter is not a guaranty within the Statute of Frauds; *Gray v. Pearson*, 2 Vict. L. R. Law, 81.

(m) *Perkins v. Hitchcock*, 49 Me. 474. Where the defendants, certain creditors of L. an insolvent, agreed to take his goods and pay his creditors a certain per cent., and wishing to get possession of certain of the goods, which had been replevied, promised the plaintiff and one C., who were

assignees for the benefit of the creditors of L., that if they would defend the replevin suits, they, the defendants, would pay all the costs and otherwise hold the plaintiff harmless therefor, this was a promise to pay their own debt and not a guaranty within the Statute of Frauds; *Carley v. Wheaton*, 14 N. Y. Week. Dig. 165, S. C. N. Y.

(n) *Burkham v. Mastin*, 54 Ala. 125.

(o) *Bird v. Gammon*, 3 Bingh. N. C. 888; *Skelton v. Brewster*, 8 Johns. 376; *McCray v. Madden*, 1 McCord, 487.

assets, is not within the Statute of Frauds.(p) But a receipt by a mother of the effects of her deceased son has been held in Indiana not sufficient to take her promise to answer his debt out of the Statute of Frauds.(q) A promise made to an administrator that if the latter will give the promissor the assets he will pay the debts is not within the statute.(r) So a promise of an heir that if the plaintiffs would forbear their claim against the decedent's estate he would pay it, is not a guaranty but an original debt, since the plaintiffs might have raised administration and sued the estate. The promissor was heir, not administrator or executor, and forbearance was treated as a new consideration to take the promise out of the Statute of Frauds: *semble*, that the defendant's interest in the estate made the latter a fund.(s) Where the plaintiff, a guardian, having funds of H. in his hands, and being a creditor of H., gave up his guardianship and handed over the estate of H. to the defendant, upon the latter promising to be personally liable for H.'s debt to the plaintiff, the Statute of Frauds does not apply.(t)

§ 54. The following are examples of cases which do not come within the "Funds" exception, and in which therefore an oral guaranty would not be enforced. In a case which in some respects resembles that of *Williams v. Leper*, an auctioneer promised to pay rent due if the landlord would not distrain upon goods of the tenant which he, the auctioneer, was then about to sell: it was held that part of the promise related to future rent, as to which the landlord had no present right of distress, and that, as the promise was inseverable, the whole was within the Statute of Frauds.(u) The mere prospect of receiving funds from the person answered for will not without actual receipt satisfy the Statute of Frauds.(v) So it has ever been held that the re-

Exceptions
to the
"Funds"
rule generally.

(p) *Tomlinson v. Gill*, Ambl. 330.

(q) *Langford v. Freeman*, 60 Ind. 50.

(r) *Randall v. Kelsey*, 46 Vt. 163; see *Locke v. Humphries*, 60 Ala. 120.

(s) *Templeton v. Bascom*, 33 Vt. 133.

(t) *French v. Thompson*, 6 Vt. 60.

(u) *Thomas v. Williams*, 10 B. & C. 668, distinguishes *Williams v. Leper* on

the above ground, and *Edwards v. Kelly* and *Castling v. Aubert*, as cases of funds, and to the same effect see *Hall v. Denholm*, 11 U. C. Q. B. 356.

(v) *Westheimer v. Peacock*, 2 Ia. 531; *Beerkle v. Edwards*, 8 No. West. Rep. 341 (S. C. Ia.); see *Abel v. Wilder*, 9 Lea, 453.

ceipt of notes not yet due will not be funds to take an oral guaranty out of the statute.(w) It has even been said that the rule is settled, that the mere possession of property belonging to the original debtor, not deposited with the defendant for the purpose of paying the debt, will not withdraw his verbal promise to pay it from the operation of the Statute of Frauds.(x)

§ 55. It is not enough to show that the guarantor held the property of the original debtor; it must be shown how he held it.(y) Transfer of stock merely to qualify the recipient to become a director in a corporation will not take a guaranty out of the Statute of Frauds.(z) So the assignment by the plaintiffs of their interest in a certain mine to a corporation of which the defendants were large stockholders is insufficient.(a) A fund held by the defendant, as executor, either under the will or de son tort, is not such a one as will take a guaranty out of the Statute of Frauds.(b) The mere receipt by a mother of the effects of her son will not be a sufficient fund; the property may be hers by right.(c) Mere receipt of a consignment, against which the usage of the parties was that drafts should be drawn, it has been held, will not take out of the Statute of Frauds a promise to pay a certain draft in consideration that the drawer should not discontinue his consignments; it being thought that the goods consigned were not sufficiently the property of the consignee to bring his promise within the "Funds" exception.(d) Where the defendants said that they had taken their father's farm, and promised to pay his debt to the plaintiff, the Statute of Frauds applied.(e)

§ 56. So, where the funds were in the guarantor's hands

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| (w) <i>Beasten v. Hendrickson</i> , 44 Md. 616. | principle, but admitting it on authority. |
| (x) <i>Hughes v. Lawson</i> , 31 Ark. 614. | (b) <i>Chandler v. Davidson</i> , 6 Blackf. 368. |
| (y) <i>Gower v. Stuart</i> , 40 Mich. 747. | |
| (z) <i>Maule v. Bucknell</i> , 50 Pa. St. 50. | (c) <i>Langford v. Freeman</i> , 60 Ind. 50. |
| (a) <i>People's Bank v. Adams</i> , 43 Vt. 198. | (d) <i>State Bank v. Mettler</i> , 2 Bosw. 396. |
| As an example of absence of a fund, see <i>Durham v. Arledge</i> , 1 Strob. 5, doubting the "Funds" rule in | (e) <i>Bundy v. Parkins</i> , 14 N. Y. Week. Dig. 416, N. Y. S. C. |

before the guaranty, and were not specifically dedicated to the purpose in question.(f) A previous condition of indebtedness by the guarantor to the person answered for, is not equivalent to a fund.(g) That a promisor is the trustee of a married woman, the person answered for, and has her property in his possession, will not be a good consideration even for a written guaranty of her debt.(h)

Funds in guarantor's hands previous to the promise.

§ 57. Before leaving the discussion of the general rule that the possession of funds by the guarantor will make an oral guaranty valid, it is necessary to give some few instances in which the principle has been almost entirely denied. Thus it has been said that the person answered for must be discharged of liability, which will of itself take the promise out of the Statute of Frauds, thus making the fact of the possession of funds of no value whatever, see *supra*, § 41, and *infra*.(i) The "Funds" rule has indeed been denied.(j) Where B. & B. made a mortgage to the plaintiffs, the principal of which should become due when the interest was unpaid; the mortgage became so due, and the plaintiffs also held a note of B. & B.; the defendant, who was assignee of the effects of B. & B., promised the plaintiffs that if they would not press their claim on the mortgage, but take interest when he could pay it, he would pay the note; the Statute of Frauds was held to apply, B. & B. remaining liable, and there being no connection between the note and the mortgage.(k) So where a purchaser of the property of a

Denial of the "Funds" rule.

(f) *Simpson v. Nance*, 1 Spear, 7, Phila. 22; but see *supra* that this is one judge diss.; see *Frame v. August*, 88 Ill. 425; *Tyler v. Stevens*, 11 Barb. 486.

(g) *Stanley v. Hendricks*, 13 Ired. 86.

(h) *Crane v. Bullock*, R. M. Charl. 319 (saying that the case of an administrator's promise was not analogous).

(i) *Jackson v. Raynor*, 12 Johns. 291 (see *Durham v. Arledge*, 1 Strob. 5, questioning it); *Stone v. Justice*, 9

(j) *Murphy v. Renkert*, 12 Heisk. 398; *Emerick v. Sanders*, 1 Wis. 92, relying on *Fish v. Hutchinson*; see, also, *Durham v. Arledge*, 1 Strob. 7; *Halstead v. Francis*, 31 Mich. 113; see *Law Mag. and Rev.*, vol. xxxii., 3d ser., 96 (Prof. Parsons of the Univ. of Penn.).

(k) *Lee v. Mitchell*, 23 U. C. Q. B. 315.

testator promised to pay certain debts of the latter the Statute of Frauds was held to apply.^(l)

§ 58. While there is not a great deal of direct authority on the point, the very silence of the decisions would establish that the amount of the fund is not of importance in determining whether or not the Statute of Frauds applies to an oral guaranty given in consideration of such fund. Thus, where the defendant, who was interested in another business with one of the firm of M. & Co., asked the plaintiff not to sue M. & Co. on a certain protested draft, and the plaintiff made a memorandum on the draft itself to the effect that he would not do so, it was held that, inasmuch as the defendant represented to the plaintiffs that he had funds of M. & Co. in his hands, the contract was taken out of the Statute of Frauds, and this though M. & Co. continued liable; and that the defendant was, moreover, estopped from showing that this statement as to the funds was not true.^(m) And it has been held that the liability for the guaranty is not confined to the fund.⁽ⁿ⁾ Where one received part of a loan the Statute of Frauds was held to be no defence to an action on his promise to be surety for such loan.^(o) And where the plaintiff gave up an accepted and endorsed bill of exchange to an attorney acting for the acceptor and for the defendant, confiding in the latter's promise to pay half the bill in cash, and gave a new security, endorsed also by the defendant for the other half, the defendant's promise was held not to be within the Statute of Frauds. It appears to be too late to argue that, on principle, the liability should be confined to the fund.^(p)

§ 59. A branch of the "Funds" doctrine is the rule that an acceptance of a bill or order is not within the Statute of

(l) *Styron v. Bell*, 8 Jones, 225.

(m) *Dock v. Boyd*, 93 Pa. St. 93.

(n) *Whitcomb v. Kephart*, 50 Pa. St. 85; but see *contra Furbish v. Goodnow*, 98 Mass. 297; *supra*, § 40; see *Ardern v. Rowney*, 5 Esp. 257; see § 59.

(o) *Dee v. Downs*, 50 Ia. 312.

(p) *Barrett v. Hyndman*, 3 Ir. Law Rep. 112; and, generally, as to the

amount of the funds, see *Ellwood v. Monk*, 5 Wend. 235; *Olmstead v. Greenly*, 18 Johns. 12; *Jack v. Morrison*, 48 Pa. St. 113. In *Williams v. Leper*, Burr. 1886, 2 Wils. 308, *Wilmot, J.*, thought that the guarantor's liability should be confined to the fund; see *Law Mag. and Rev.*, vol. xxxii., 3d series, 96.

Frauds; the acceptor is the one primarily liable, and he has, or is supposed to have, funds out of which to answer the acceptance.(g) Whether the bill is foreign or inland, the rule is the same.(r) Under act of Congress of March 3, 1869, as to certifying checks, no written acceptance is necessary.(s) Where it was the custom of a bank to state in a certificate by the teller, on the back of the note, that a note of their customer was good, and to settle in their exchange the next day, such an endorsement being treated as payment, it was held that the Statute of Frauds had no application; that the certificate was an admission of funds, and the liability, one to pay the bank's own debt, and this though the maker's deposit was not good for the note, and the teller's endorsement was in violation of his duty and a fraud.(t) In a decision in 48 Maryland Reports, the law is stated thus: "The Statute of Frauds has no application in suits on an acceptance, which, as against the payee, conclusively admits funds of the drawer to be in hand. The drawer and acceptor are the *immediate* parties to the consideration, and, if the acceptance be without consideration, the drawer cannot recover of the acceptor. But the payee holds a different relation: he is a stranger to the transaction between the drawer and the acceptor, and is therefore, in a legal sense, a *remote party*. In a suit by him against the acceptor, the question as to the consideration between the drawer and acceptor cannot be inquired into. The payee or holder gives value to the drawer, and, if he is ignorant of the equities between the drawer and acceptor, he is in the position of a *bona fide endorsee*."(u) Even where an acceptance of a bill is required by statute to be in

Acceptance
of a bill;
oral accept-
ance good.

(g) Jones v. Ellis, 4 Luz. Leg. Reg. 484; Bird v. McElvaine, 10 Ind. 40; 276, C. P. Luz. Co.; Dull v. Bricker, 76 Pa. St. 260; Jarvis v. Wilson, 46 Conn. 913. (r) Stockwell v. Bramble, 3 Ind. 429. (s) National Bank of Wheeling v. Merchants' Nat. Bank, 7 W. Va. 548. (t) Mead v. Merchants' Bank of Albany, 25 N. Y. 149, citing Farmers' Bank v. Butchers' Bank, 16 N. Y. 125. (u) Lafin, etc., Powder Co. v. Sinsheimer, 48 Md. 418.

91; Barnet v. Smith, 30 N. H. 265; Lemmon v. Box, 20 Tex. 332; Nelson v. Nat. Bank Chic., 48 Ill. 40; Sturges v. Fourth Nat. Bank, 75 Ill. 596; Scudder v. Union Nat. Bank, 91 U. S. 411 (passing on Illinois law); McCutchen v. Rice, 56 Miss. 458 (Code, § 2230, not applying); Carville v. Crane, 5 Hill,

writing, the Statute of Frauds was held not to apply under the following circumstances, viz: where there was an attachment by the St. Louis Insurance Co. against Curle, under an execution against A., and Curle admitted that, being indebted to O., he verbally promised A., who presented to him an order in his (A.'s) favor, given by O., to pay him (A.); the court saying that the proceeding was an equitable one, and taking a distinction between a bill of exchange and a mere order.^(v) It seems that where credit has been given to the person answered for without reliance upon a promise to accept a bill of exchange, the latter may be within the Statute of Frauds.^(w) In a case in 1 Holmes, the court said: "A verbal acceptance of, or a verbal promise to accept, a check, when the acceptor has funds of the drawer in his hands, is entirely without the operation of the Statute, from the consideration that the drawee's engagement is, in fact, to pay his own debt to the drawer, the owner of the funds. But it is not perceived how any sound reason can be given why a verbal acceptance, or promise to accept, for the mere accommodation of the drawer, without funds or value received, should not be treated as within the Statute. Courts have frequently expressed their dissatisfaction that the rule with regard to implied as well as parol acceptances of bills has been carried as far as it has, and their regret (as stated in *Boyce v. Edwards*, 4 Pet. 122) 'that any other act than a written acceptance of the bill had ever been deemed an acceptance.'"^(x) The court added that the case of a check was different from that of a bill. So in an Iowa case the court said: "The plaintiff's argument is that a verbal acceptance is equivalent to a written acceptance; that the validity of a written acceptance does not depend upon the existence of funds of the drawer in the hands of the acceptor, therefore the validity of a verbal acceptance does not. But we cannot accept this reasoning as sound. It is true that no consideration is necessary to bind an acceptor who has become

(v) *Curle v. St. Louis Ins. Co.*, 12 Mo. 580; see § 60. 213, citing numerous cases, and distinguishing *Townsley v. Sumrall* on the

(w) *Strohecker v. Cohen*, 1 Spear, 353. ground that there the money was paid on the strength of the acceptance.

(x) *Morse v. Mass. Bank*, 1 Holm.

such by written acceptance. But then he becomes a party to the paper. His liability, we apprehend, rests strictly upon this ground. An acceptor by verbal acceptance does not become a party to the paper, certainly not in any such sense as he would by written acceptance.”(y) Before a statute expressly requiring a writing, an oral acceptance was formerly good in England;(z) and so in New York;(a) and so in Minnesota.(b) What constitutes the acceptance is a wide subject, and one in its nature belonging rather to a treatise on bills and notes. The acceptance may be inferred from the conduct or the words of the drawee,(c) such as detaining a bill a long time so as to give credit to it.(d) *Seem*, that an oral promise to accept a bill cannot be treated as an actual acceptance so as to make it valid in absence of proof of consideration; though taking the bill on the faith of such promise would be

(y) *Walton v. Mandeville*, 56 Ia. 599; the court adding: “A verbal promise to pay the debt of another can be enforced where the promissor by the payment would pay his own debt as well as of the person in whose behalf the promise was made. And such is precisely the case where there is a verbal acceptance of an order by a person who has funds of the drawer. Indeed, it is not necessary that the request should be made in writing. If A., having funds belonging to B., promises C., at B.’s verbal request to pay C. from such funds a debt due him from B., A. is holden. This doctrine is elementary. The validity of a verbal acceptance of an order must, we think, rest upon the same ground. We see no other. The view which we have expressed appears to us to be the only safe view, and the only one which can be sustained upon principle. The defendants have been adjudged to pay another person’s debt, in the absence of any consideration, upon an alleged verbal promise of their agent, such promise being expressly denied by the

agent, and proven by no evidence except the testimony of the plaintiff, and that of a very weak and unsatisfactory character. We are unwilling to sanction a rule which shall make a recovery possible in such a case.” As to the validity of the oral acceptance, the court cited *Dan. Negot. Ins.*, § 566; and for the other view cited *Browne, S. of F.* 174; *Robin. Prac.*, vol. ii. 152; *Quin v. Hanford*, 1 Hill (N. Y.), 84; *Pike v. Irwin*, 1 Sand. (N. Y.) 121; *Manley v. Geagan*, 105 Mass. 445; *Plummer v. Lyman*, 49 Me. 229; *Wakefield v. Greenhood*, 29 Cal. 600.

(z) *Lumley v. Palmer*, *Hardw.* 74; 2 Str. 1000 (an inland bill); *Clarke v. Cock*, 4 East, 71; *Johnson v. Collings*, 1 id. 103 (Lord Kenyon regretting that such was the law).

(a) *Ontario Bank v. Worthington*, 12 Wend. 593.

(b) *Heenan v. Nash*, 8 Minn. 410; and in South Carolina, *Strohecker v. Cohen*, 1 Spear, 353.

(c) *McCutchen v. Rice*, 56 Miss. 458.

(d) *Dunavan v. Flynn*, 118 Mass. 538.

sufficient consideration.^(e) (See § 62.) For examples of sufficient acceptance, see the cases in the note.^(f)

§ 60. The following are a few examples of acceptance not within the Statute of Frauds. Thus, where the defendant's intestate had rented the plaintiff's land for two bales of cotton, and the plaintiff made advances to the former for which he, the plaintiff, was to have the crop, the defendant's intestate agreed with O. for supplies upon the plaintiff's promise to pay O.; it was held that the promise of the defendant's intestate to O. need not be in writing, because the arrangement was regarded as a verbal order on the plaintiff, and verbally accepted by him in favor of O. to be paid out of the share in the crop to which the defendant's intestate was entitled, and when such share was handed over to the latter.^(g) Where a third person, McC., gave the plaintiff, to whom he was indebted, an order on the defendant, who had goods belonging to McC., and the defendants agreed to sell the goods and apply the proceeds to a debt due them by McC., and also to McC.'s debt to the plaintiff, the Statute of Frauds did not apply.^(h) A draft to the drawer's order on the defendant, and recited to be an advance on the drawer's cotton crop consigned to the defendant, may be verbally accepted.⁽ⁱ⁾ The following are some examples of a want of sufficient acceptance. Thus, where the defendant, a creditor of one L., drew an order in favor of the plaintiffs on L., but which was never presented for acceptance by the plaintiffs, who had lent the defendant money for which they sue; it was held that a promise by the plaintiffs, who

(e) *Strohecker v. Cohen*, 1 Spear, 353.

(f) *Ardern v. Rowney*, 5 Esp. 255, where one A. drew a check for £100 in his own favor on Rowney, the defendant, and asked Ardern, the plaintiff, to discount it. Ardern sent to Rowney, who said that he would pay it, as he owed A. £200, and, when his attention was called to the fact that the check was post-dated and invalid, he said that it still should be paid. Lord Ellenborough regarded this promise as a specific appropriation of a sum

named, and valid, notwithstanding the Statute of Frauds; and it being shown that Rowney only owed A. really £80, the verdict for the plaintiff was reduced to that amount. See, also, *Jones v. Ellis*, 4 Luz. Reg. 276, C. P. Luz. Co., Penna.

(g) *Neal v. Bellamy*, 73 No. Car. 389.

(h) *Clark v. Hall*, 6 Halst. 84.

(i) *Sorrell v. Jackson*, 30 Ga. 901 (*semble*).

held goods of L. to pay the defendant his debt to him out of the surplus which might remain in the sale of the goods over their, the plaintiffs', advancement to L., is *semble* a guaranty within the Statute of Frauds, and is without consideration; L. was never discharged.(j) Where one C. promised by a sealed writing to make a certain payment to the plaintiff's assignor in notes of the defendant, and gave a written order to the defendant to deliver the notes to B., the defendant is not liable (under the guaranty clause), unless he executes a sufficient writing. It did not appear that he was indebted to C. or to the defendant, or until he had executed an acceptance of C.'s, that he was in any way bound; the paper he signed was a memorandum insufficient under the Statute of Frauds, because not stating a consideration (k) The doctrine that an oral acceptance is good does not extend to such an acceptance on accommodation of a bank check.(l)

§ 61. Now by statute the acceptance of a bill of exchange must, in England and in many of the United States, be in writing.(m) A promise by a widow to pay a bill accepted by her husband and herself cannot, however, be proved by oral evidence under the Scotch law.(n) An oral agreement to take a draft on himself as payment is invalid under a statute enacting that no person shall be charged as acceptor, unless his acceptance be in writing.(o) The acceptance may in New York be either by cipher or written characters.(p) Retaining a bill of exchange is not negotiating it within the meaning of the exception to the

Written
acceptance
required by
statute.

(j) *Chilcote v. Kile*, 47 Ill. 89.

(k) *Wilson v. Roberts*, 5 Bosw. 108.

(l) *Morse v. Mass. Bank*, 1 Holmes, 217.

(m) *Chalie v. Belshaw*, 6 Bingh. 529; 1 and 2 Geo. IV., c. 78; *Walker v. McKinley*, Court of Sess. 6 R. 1132 (Scotch), S. C. in Dom. Proc. sub. nom., *Steele v. McKinlay*, 5 App. Cas. 754; 19 and 20 Vict., c. 60, § 11; 41 Vict., c. 13, § 1; *Oneida Bank v. Hurlbut*, 1 American Law Register, 221 (S. C.

N. Y.); 1 R. S. 768, § 6; *Loonie v. Hogan*, 5 Seld. 441; *Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Blakiston v. Dudley*, 5 Duer, 377; *Rousch v. Duff*, 35 Mo. 314.

(n) *Walker v. Home*, Court Sess. Cas. 6 S. 205; see *Hay v. Boyd*, 3 Mur. (Sc.) 19.

(o) *Elliott v. Miller*, 8 Mich. 135.

(p) *Oneida Bank v. Hurlbut*, 1 Am. Law Reg. 221 (S. C. N. Y.); see chapters on the memorandum.

New York statute.(g) An acceptance written and signed by the defendant, and then telegraphed and delivered to the plaintiff, is sufficient under the New York statute.(r) An oral acceptance, under a proviso in the statute requiring written acceptance, is good when the bill has been negotiated on the faith of the promise.(s) In California, by statute, acceptance of a bill must be in writing, but such an invalid bill may be good as an assignment of the claim held by the drawer of the bill.(t) In a late Missouri case it was said "that the only point of objection to the judgment is, that the order given the defendant by a creditor of the plaintiff, not having been accepted in writing by the plaintiff, was not binding, but it appeared in this case that all three of the parties, plaintiff, defendant, and the plaintiff's creditor, met together, and that it was agreed between them that the plaintiff could pay to defendant the debt he owed to the third person, who was a debtor of defendant to the same amount. Such an agreement, though verbal, is not within the Statute of Frauds. The order in this case was not the foundation of the action, but merely admitted to show the exact amount assumed by the plaintiff.(u)

§ 62. A promise to accept is also not within the Statute of Frauds.(v) So it has been said that a promise to accept, dif-

(g) *Blakiston v. Dudley*, 5 Duer, 377.

(r) *Molson's Bank v. Howard*, 40 N. Y. Super. 20; see as to sufficient acceptance, *Bank of Mich. v. Ely*, 17 Wend. 511. Writing one's name across the bill is sufficient acceptance; *Spear v. Pratt*, 2 Hill, 582. Where the drawee of a bill of exchange on presentation made a small payment, and wrote a receipt therefor on the bill, which receipt the payee of the bill signed, it was held not to satisfy a statute requiring acceptance to be in writing signed by the acceptor; *Bassett v. Haines*, 9 Cal. 261. Under 19 and 20 Vict. c. 60, a drawee could accept by merely writing his name, but a

stranger must add words of acceptance; *Steele v. McKinlay*, *supra*, n. (m.), doubting *Matthews v. Bloxsome*, 33 L. J. Q. B. 209. Under 41 Vict. c. 13, the rule is now otherwise. See *Vallé v. Cerré*, 36 Mo. 590, as to the Missouri statutes.

(s) *Flato v. Mulhall*, 72 Mo. 523; see Mo. Stat., § 537.

(t) *Wheatley v. Strobe*, 12 Cal. 97.

(u) *Wright v. McCully*, 67 Mo. 134, citing *Black v. Paul*, 10 Mo. 104; see *Curle v. St. Louis Ins. Co.*, 12 Mo. 580, § 59.

(v) *Spaulding v. Andrews*, 48 Pa. St. 412; *Strohecker v. Cohen*, 1 Spear, 353; *Light v. Powers*, 13 Kan. 98; *Kohn v. Nat. Bank*, 15 Kan. 434.

fering from a promise to endorse, is not within the Statute of Frauds, because the acceptor is *quoad*, the funds in his hands, the principal debtor, and the bill is a mere transfer of such funds; in promising to accept the drawee engages to put himself in a position where he will be obliged to pay his own debt.^(w) An oral promise to accept a bill is an engagement rather to pay the defendant's debt due the drawer than to pay the drawer's debt to the plaintiff; since the acceptor is supposed to hold funds.^(x) An agreement by which the guarantor undertakes to accept a bill drawn for goods supplied to the party answered for is original, and not within the Statute of Frauds.^(y) A promise to accept in some English cases has been treated as equivalent to an acceptance;^(z) at least as to an existing bill;^(a) or even, it is said, to a non-existing bill.^(b) But the English rule was otherwise as to this last:^(c) where the plaintiff rendered one B. a bill, and B. wrote on the bill a request to the defendant to pay it; it was held that this was a bill of exchange, and the defendant's oral promise to pay it was a good guaranty.^(d) Where the plaintiff, upon promise of reimbursement by the defendant, cashed orders which the latter had promised to pay, the Statute of Frauds does not apply.^(e) The vendee of land is liable on an order drawn on him for the price by the vendor; the promise to accept would here seem to be implied.^(f) The following are examples of oral promises to accept held invalid: Thus, where one G. ordered goods of the plaintiff, who agreed to let him have them upon the defendant's agreeing to accept a bill drawn on him by G., the Statute of

(w) *Carville v. Crane*, 5 Hill, 484; see *Pike v. Irwin*, 1 Sandf. 15.

(x) *Fisher v. Beckwith*, 19 Vt. 34.

(y) *Taylor v. Hilary*, 1 C. M. & R. 742.

(z) *Clarke v. Cock*, 4 East, 71.

(a) *Hatcher v. Stalworth*, 25 Miss. 376; *Jones v. Council Bluffs Bank*, 34 Ill. 319.

(b) *Nelson v. Nat. Bank of Chicago*, 48 Ills. 40, citing cases; and see *Strohecker v. Cohen*, 1 Spear, 353.

(c) *Johnson v. Collings*, 1 East, 103; and see *Plummer v. Lyman*, 49 Me. 232.

(d) *Shields v. Middleton*, 2 Cranch C. C. 205.

(e) *Comstock v. Norton*, 36 Mich. 279. The drawer of the order was a contractor employed by the defendant, and the drawees were the contractor's employés.

(f) *Lucas v. Payne*, 7 Cal. 96.

Frauds applied. (g) Where the plaintiff had a lien on a vessel, and the defendant, holding it as security for another claim, agreed to accept an order in favor of the plaintiff drawn by S., the person who was building the ship, and who was the defendant's debtor, the Statute of Frauds applied, the plaintiff not having released his lien nor his claim against S. (h.) Where the defendant had employed the plaintiff to transport goods of B., and promised to pay any order B. might draw on him for the cost of transportation, the Statute of Frauds was held to apply. (i) A promise by the drawee of a bill to pay it is not sufficient as an acceptance under the law of New York, and is a guaranty within the Statute of Frauds. (j) A parol promise to accept cannot, *semble*, be treated as an actual acceptance, so as to make it valid in absence of proof of consideration. (k) It was thought that, though, previous to the Revised Statutes, an oral acceptance was valid, the rule was otherwise where the bill had not as yet been drawn. (l) A written promise to accept a bill, whereby the bill was taken, binds as an acceptance. (m) But an oral promise to accept a bill of exchange is not an actual acceptance. (n) The party primarily liable on a bill is the acceptor, and a promise by one of several drawers to answer to the acceptor for the other drawer is a guaranty within the Statute of Frauds. (o)

§ 63. This really comes within the rule that a promise to endorse as distinguished from a promise to accept is within the Statute of Frauds. (p) A verbal promise

Promise to
endorse.

(g) *Williams v. Caldwell*, 4 Rich., N. S. 104; see *Benson v. Walker*, 5 Har. (Del.) 115; *Cohrell v. Hatfield*, Stev. N. B. Dig. 691.

(h) *Plummer v. Lyman*, 49 Me. 232.

(i) *Wakefield v. Greenhood*, 29 Cal. 599.

(j) *Matteson v. Moulton*, 79 N. Y. 628; see *Watson v. Gray*, 4 Keyes, 395.

(k) *Strohecker v. Cohen*, 1 Spear, 353.

(l) *Ontario Bank v. Worthington*, 12 Wend. 593; see, also, in Alabama, *Kennedy v. Geddes*, 8 Porter, 266.

(m) *Coolidge v. Payson*, 2 Wheat. 70, citing cases.

(n) *Bank of Ireland v. Archer*, 11 M. & W. 383.

(o) *Suydam v. Westfall*, 4 Hill (N. Y.), 217; see *Plummer v. Lyman*, 49 Me. 229; see *Mallett v. Bateman*, L. R., 1 C. P. 170; 16 C. B. N. S. 543; 10 L. T. N. S. 869; 10 Jur. N. S. 865.

(p) *Smith v. Easton*, 54 Md. 138; *Willis v. Shinn*, 42 N. J. 139; see *Drake v. Markle*, 21 Ind. 435; *Taylor v. Drake*, 4 Strob. (Law), 436; *Macdonald v. The Bank*, Sess. Cas. 2 M. 976; approved in *Steele v. McKinlay*, § 61, n. (m);

for a valuable consideration by the payee of a note, to give an extension of time to one maker, must be in writing.(q) It has, however, been held that a promise to endorse a new note, by one liable on a previous one to the same party, is not within the Statute of Frauds.(r) It has been said that the endorsement of a note is not a guaranty in the sense of the Statute of Frauds, but is a new contract between the endorser and the endorsee.(s) So an endorsement as follows on a promissory note, "I guarantee the payment of the within note," is an endorsement, and not a guaranty, or a collateral promise.(t) But the opposite rule is probably the sounder.(u) Where the promise was by one, liable as endorser of the note of A., to pay the holders of that note a certain proportion of the loss they might suffer as the holders of other notes of A., if they would forbear to sue him, it was said that the Statute of Frauds did not apply; but the plaintiff could not recover, because no consideration—as that the maker of the first note was insolvent, etc.—was shown.(v) In a New York case it was held that evidence to alter the legal liability of the endorsers of a note may be admissible, notwithstanding the Statute of Frauds, where the legal character of the contract remained the same, although promissory notes given for the accommodation of the maker were used as collateral security for a credit given the maker, and the endorsers thereby became sureties.(w) Where the plaintiffs, the persons to whom a guaranty was given, took a bill and endorsed it to the guarantor, the defendant, who endorsed it to the plaintiffs, there was admitted, in order to show a liability on the part of the former towards the latter, evidence of the oral guaranty, to sustain the suit, which would otherwise, under the rule

Rayne *v.* Terrell, 33 La. Ann. 815; considering and distinguishing Carville
 Nelson *v.* Richardson, 4 Sneed, 311; *v.* Crane, Gallagher *v.* Brunel.
 Potter *v.* Brown, 35 Mich. 279; Lines (s) Spann *v.* Baltzell, 1 Flor. 313.
v. Smith, 4 Flor. 47. See Chitt. on (t) Walker *v.* O'Reilly, 7 U. C. L. J.,
 Bills, 83, n. (c). See § 34. O. S., 300, County Court, Frontinac.

(q) Benedict *v.* Cox, 52 Vt. 250; Gen. (u) Mizner *v.* Spier, 96 Pa. St. 533.
 Stat. Vt. c. 66, § 4; see German Vet. (v) Myers *v.* Morse, 15 Johns. 425.
 Soc. *v.* Finzer, 1 Kent. Law Rep. 57. (w) Zellweger *v.* Caffé, 5 Duer, 91.

(r) Westcott *v.* Keeler, 4 Bosw. 572,

against circuity of action, have been unsustainable.(x) Where under an oral agreement that the defendant should become surety for his son, the plaintiff drew a bill on the son payable to the defendant's order, and the latter endorsed it, and so endorsed delivered it to the plaintiff, the latter may recover, because the writing shows the agreement contended for as having been orally made; and the ordinary rule that the drawer of a bill cannot sue an endorser does not apply here, because that rule is directed against the circuity of action which would arise, if the endorser having paid could at once turn round and sue the drawer; but here the endorser could not have sued the drawer.(y)

§ 64. The plain implication of all that has been said above in discussing the consideration of a guaranty, is that the fact that the guaranty has a consideration does not take it out of the Statute of Frauds. It now becomes necessary to take up this point explicitly, because it has been held on high authority that the existence of a new consideration moving between the parties may take an oral guaranty out of the Statute of Frauds. It may be said, therefore, that the mere fact that a guaranty has a consideration, without which, even at common law it would have no validity, does not make the Statute of Frauds to cease to apply; an enactment prohibiting oral proof of a contract invalid *per se* would have been irrational.(z) This

The fact of a consideration will not take guaranty out of the Statute of Frauds.

(x) *Wilkinson v. Unwin*, 46 L. T. 123; *Bagallay, J.*, dubit.

(y) *Holmes v. Durkee*, 1 Cab. & Ell. 24, citing *Steele v. McKinlay*, 5 App. Cas., as a case of an endorsement made by one who had no right to endorse, not being the acceptor of the bill. See note considering this and other cases, and saying that under all the cases the bill or note should create a liability regular under the law merchant, and that this liability appearing from the paper should agree with that assumed by the guarantor, and with that which is the ground of the suit. See *Macdonald v. Whitfield*, 49 L. T. N. S.

446 (Priv. Coun.), digested in the appendix, *infra*.

(z) *Fennell v. Mulcahy*, 8 Ir. L. R. 434; *Hite v. Wells*, 17 Ill. 90; *Smith v. Stevens*, 3 Ind. 332; *Mundy (Adm. Terry.) v. Ross*, 3 Green, N. J. 468; *Bumford v. Purcell*, 4 G. Green (Ia.), 489; *Waggenger v. Bells*, 4 Mon. 9; *Simpson v. Patten*, 4 Johns. 422; *State Bank v. Mettler*, 2 Bosw. 396; *Belknap v. Bender*, 6 Th. & Cook, 613; 4 Hun, 414; *McCafferty v. Decker*, 5 N. Y. Weekly Dig. 379; *Simpson v. Nance*, 1 Spear, 7; *First National Bank v. Kinner*, 1 Utah, 100; *Cross v. Richardson*, 30 Vt. 647-8-9.

very plain doctrine is thus stated in an Illinois decision: "The promise is to answer for the debt of another, and is, therefore, within the Statute. But it is insisted that the undertaking of Wells to procure the order, and the procuring the same, constituted a new consideration, and that upon this is based an original and independent contract. The plain answer to this position is, that the Statute requires the *promise* to be in writing, and the common law makes a consideration necessary to the legal obligation of the promise. Though the guarantor had promised in writing, a consideration would have been necessary to sustain the promise. No promise or agreement, except under seal (which imports a consideration), not founded upon a consideration good in law, can be enforced." (a) No promise is binding in law, unless founded on a consideration, and to hold that a consideration alone would render valid a promise to pay the debt of another, would be to hold that the promise need not be in writing in any case. (b) A written guaranty must have a consideration to be valid at common law. (c) The consideration of the debt answered for will not enure to support the guaranty. (d) The mere fact that the consideration is a new one, and not that on which the debt answered for is founded, will not make an exception to the Statute; the person answered for remaining liable. (e)

§ 65. There is, however, a very strong current of authority in favor of the view that a new, not before enjoyed, superadded, sufficient, and beneficial consideration passing between the parties to the guaranty, and moving to the guarantor, will take the case out of the Statute of Frauds. (f) The Supreme Court of the United

A new consideration moving to the promisor.

(a) *Hite v. Wells*, 17 Ill. 90.

(e) *Combs v. Harshaw*, 63 No. Car.

(b) *Martin v. Black*, 21 Ala. 729; 198; *James v. Balfour*, 7 Ont. App. 461.

(c) *Beers v. Spooner*, 9 Leigh, 156; *Cutler v. Everett*, 33 Me. 201; *Hayden v. Weldon*, 43 N. J. Law, 130; *Crane v. Bullock*, R. M. Charl. 319.

(d) *Crane v. Bullock*, R. M. Charl. 319; *Bingham v. Kimball*, 17 Ind. 398; (though *secus* when the two arise out of a common transaction).

(f) *Carothers v. Connolly*, 1 Mont. Rep. 436; *Townsley v. Sumrall*, 2 Pet. 182; *Tompkins v. Smith*, 3 Stew. & Port. 55; *McKenzie v. Jackson*, 4 Ala. 232, citing cases; *Blount v. Hawkins*, 19 Ala. 100; *Graves v. Shulman*, 59 Ala. 407, citing cases; *Locke v. Humphries*, 60 Ala. 120; *Kurtz v. Adams*, 7 Eng.

States has said that "cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are in general within the Statute of Frauds. Other cases arise which also fall within the Statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties." (g) This view, as will be seen hereafter, is in many cases quite unnecessary to justify the enforcement of the oral promise, the latter being saved from the Statute for other and undisputed reasons. In a Minnesota case, for example, which really came within a principle to be discussed hereafter (§ 127) the court chose to rest the decision on the new consideration rule, and said that "while the authorities disagree as to the reason for the rule, yet they agree in holding that where the holder of a contract of a third person transfers it to another upon a consideration moving to himself, his guaranty hereof, made simultaneously with the transfer, and as a part of the transaction, is not a

(Ark.) 177; *Comstock v. Breed*, 12 Cal. 288; *Thatcher v. Rockwell*, 4 Col. 409; *Brown v. Curtiss*, 2 Comst. 231; *Spann v. Baltzell*, 1 Flor. 313; *Lines v. Smith*, 4 Flor. 47; *Scott v. Thomas*, 1 Scamm. 58; *Drake v. Markle*, 21 Ind. 435; *Johnson v. Knapp*, 36 Iowa, 617; *Dearborn v. Parks*, 5 Greenleaf, 84; *Griffin v. Derby*, 5 Greenl. 476 (Dictum); *Doyle v. White*, 26 Me. 349; *Todd v. Tobey*, 29 Me. 222; *Maxwell v. Haynes*, 41 Me. 559; *Elder v. Warfield*, 7 Harr. & J. 396; *Brooks v. Dent*, 1 Md. Ch. Dec. 526; *Alger v. Scoville*, 1 Gray, 391; *Calkins v. Chandler*, 36 Mich. 325; *Nichols v. Allen*, 22 Minn. 283; *Sheldon v. Butler*, 24 Minn. 515; *Allen v. Thompson*, 10 N. H. 34; *Britton v. Angier*, 48 N. H. 422, citing many cases; *Kutzmeyer v. Ennis*, 3 Dutch. 374; *Myers v. Morse*, 15 Johns. 425; *Leonard v. Vredenburg*, 8 Johns. 37 (the leading case); *Farley v. Cleveland*, 4 Cow. 492; 9 Cow. 630; *New York and Erie R. R. v. Gilchrist*, 16 How. Pr. 564; *Allen v. Eighmie*, 14 Hun, 559; *Cock v. Moore*, 18 Hun, 32; *Cooper v. Chambers*, 4 Dev. 261; *Hedges v. Strong*, 3 Oreg. 18; *Rowland v. Rorke*, 4 Jones, 336; *Arnold v. Stedman*, 45 Pa. St. 188-9; *Hindman v. Langford*, 3 Strob. 207; *Aikin v. Cheeseborough*, 1 Hill (So. Car.), 173; *Hall v. Rodgers*, 7 Humph. 536; *French v. Thompson*, 6 Vt. 60 (Dictum); *Osborne v. Farmers, etc., Co.*, 16 Wis. 39; *Houghton v. Ely*, 26 Wis. 185, citing cases; *Young v. French*, 35 Wis. 116.

(g) *Emerson v. Slater*, 22 How. (U. S.) 35.

promise to answer for the debt or default of another within the meaning of the Statute.^(h)

§ 66. But as an unqualified rule this principle has in other cases been denied or questioned.⁽ⁱ⁾

New consideration rule doubted.

§ 67. Such new consideration has been styled an important but not controlling feature.^(i') As will be seen later (§ 71), a distinction has been made between a consideration passing generally between the parties and one passing only to the promisor: it has been thought that the latter qualification is essential, and that Chancellor Kent was too broad in his statement when he included any new consideration passing between the parties.^(j)

Consideration passing to the guarantor.

§ 68. As *Leonard v. Vredenburg* is the leading case on the point now before us, it is well to give Chancellor Kent's precise words. He says: "There are, then, three distinct classes of cases on this subject, which require to be discriminated: 1. Cases in which the guaranty or promise is collateral to the principal contract; but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not nor need be any other consideration,

Leonard v. Vredenburg.

(h) *Wilson v. Hentges*, 29 Minn. 103.

(i) *Mason v. Hall*, 30 Ala. 601; *Davis v. Banks*, 45 Ga. 140; *Eddy v. Roberts*, 17 Ill. 505; *Holderbaugh v. Turpin*, 75 Ind. 86, citing cases; *Hassinger v. Newman*, 83 Ind. 125; *Stewart v. Campbell*, 58 Me. 439; *Ames v. Foster*, 106 Mass. 402; *Loomis v. Newhall*, 15 Pier. 166; *Nichols v. Allen*, 22 Minn. 283; *Garner v. Hudgins*, 46 Mo. 399; *Hetfield v. Dow*, 3 Dutch. 447; *Price v. Trusdell*, 28 N. J. Eq. 201; *Brewster v. Silence*, 4 Seld. 207; *Kingsley v. Balcome*, 4 Barb. 135; *Spicer v. Norton*, 13 Barb. 545; *Barker v. Bucklin*, 2 Denio, 59; *Mallory v. Gillett*, 21 N. Y. 413; *Maule v. Bucknell*, 50 Pa. St. 39; *Townsend v. Long*, 77 Pa. St. 146; *Durham v. Arledge*, 1 Strob. 5; *Macey v. Childress*, 2 Tenn. Ch. 442; *Lemmon v. Box*, 20 Tex. 332; *Harring-*

ton v. Rich, 6 Vt. 673; *Fullam v. Adams*, 4 Am. L. Reg. N. S. 465; 37 Vt. 391; *Emerick v. Sanders*, 1 Wis. 101; *Putney v. Farnham*, 27 Wis. 189; *Wyman v. Goodrich*, 26 Wis. 22.

[The following cases are non-committal.]

Macey v. Childress, 2 Tenn. Ch. (Cooper), 424; *Blackford v. Plainfield Gaslight Co.*, 43 N. J. Law, 441; *McCoskey v. Deming*, 3 Blackf. 146; *McCoy v. Williams*, 6 Ill. 589; *Sweatman v. Power*, 49 Miss. 26.

(i') *Holderbaugh v. Turpin*, 75 Ind. 85.

(j) See *Leonard v. Vredenburg*, 8 Johns. 37; and see *Mallory v. Gillett*, 21 N. Y. 424; see *Steward v. Campbell*, 58 Me. 441, commenting thereon. See 1 Sm. L. C. (7th Am. ed.) 515, etc.; *Smith on Contr.* 102 n. (6th Am. ed.).

than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. The cases of *Fish v. Hutchinson* (2 Wils. 94), of *Chater v. Beckett* (7 Term Rep. 201), and of *Wain v. Warlters*, are samples of this class of cases. 3. A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The first two classes of cases are within the Statute of Frauds, but the last is not.”(k)

§ 69. The new consideration rule was first, perhaps, suggested by Lord Hardwicke.(l) In a later case it was said that if there be a new consideration moving from the plaintiff to the defendant, though it is a promise to pay the debt of another person, it need not be in writing.(m) And in an Irish case this principle was urged by counsel and adopted by part of the court.(n) Yet it plays but a slight part in the English law of the Statute of Frauds; such cases as in America have been often classed under it are in England considered as belonging to certain special heads, such as the “Funds” rule, etc.

§ 70. In the United States the principle has been stated in a great variety of ways, which can be best shown by citations from judicial opinions. Thus it has been said that “if the promise be not reduced to writing, then, before it can be enforced as a valid contract, it must be shown that the consideration was beneficial to the promissor. The reason of this distinction

History of
the new
considera-
tion rule.

Statements
and general
examples
of new
considera-
tion rule.

(k) 8 Johns. 37; see *Graves v. Scott*, 23 La. Ann. 690, affirming the rules laid down in *Leonard v. Vredenburg*.

(l) *Tomlinson v. Gill*, Ambl. 330.

(m) *Clancy v. Piggott*, 4 N. & M. 502; 2 A. & Ell. 473.

(n) *Fennell v. Mulcahy*, 8 Ir. L. R. 434. See opinions of Pennefather and Lefroy, BB., citing *Tomlinson v. Gill*.

is plain, for to enforce a promise (not reduced to writing) to pay the debt of another, when the consideration is not beneficial to the promissor, would be wholly to disregard the Statute of Frauds. On the other hand, if the consideration of the promise was beneficial to the promissor, and we should refuse to enforce it because it was not reduced to writing, we should allow the promissor to retain the benefit, and yet refuse to comply with his promise. This would be to enable him to commit a fraud.”(o) Speaking of a guaranty, the court, in a New Jersey case, said: “In such transaction, the simple fact that a good consideration for the assumption exists is not sufficient, but superadded to this, such consideration must be apparently beneficial to the party undertaking to pay the debt and assume the obligation;” and added that, if the primary purpose of the guarantor was to serve himself, the Statute of Frauds did not apply.(p) In a Pennsylvania case, the earlier statements of Kent and Chief Justice Savage were quoted with approbation as follows: “Where the promise arises out of some new consideration of benefit or harm moving between the newly contracting parties, or, as expressed by Mr. Roberts (Rob. on Frauds, 232), if it spring out of any new transaction, or move to the party promising upon some fresh and substantive ground of a personal concern to himself. . . . The marginal note, to *Farley v. Cleveland*, expresses the decision and the principle in the following clear terms: ‘Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promissor or harm to the promisee, moving to the promissor either from the promisee or the original debtor, such promise is not within the Statute of Frauds, though the original debt still subsists and remains entirely unaffected by the new agreement.’”(q) It has been

(o) *Martin v. Black*, 21 Ala. 729.

(p) *Cowenhoyen v. Howell*, 36 N. J. 325.

(q) *Arnold v. Stedman*, 45 Pa. St. 188. See *Connor v. Williams*, 2 Roberts. 49, in which it was said that “it is well settled, upon authority, that all promises founded upon a consideration which moves to the primary debtor as

a forbearance to sue him, a release of some security to him or harm to his creditor, or any benefit to the debtor, in which the promissor has no interest or concern, are void because within the Statute. But where the promise is founded upon a consideration (whatever its nature), in the language of Chief Justice Savage, ‘moving to the

said that, where the consideration moves to the promissor, it may consist either of benefit to him or harm to the promisee;(r) but how the latter kind of consideration can move to the promissor it is not easy to see.(s) And it has been said, "by force of the Statute, an unwritten promise to pay the debt of another is inefficacious; the new assumption consequently, if it is to have any legal obligation, must not have such an object in view as its primary purpose, but the primary purpose must be to promote the interest of him who takes the burthen upon himself. Hence it is that, in such transactions, a mere detriment to the promisee, the original obligation remaining unextinguished, will not support a promise of this character. Such a consideration would be good at common law, independently of the effect of the Statute, because, before the passage of the act, any legal agreement to pay the debt of another was valid, but now such an agreement must be in writing. The consequence is that agreements which will have the effect to discharge the debt of another must be founded in a motive of interest, selfish in the promissor. The distinction is between a promise the object of which is to promote the interest of another, and one in which the object is to promote the interest of the party making the promise. The former is within the operation of the Statute, the latter is unaffected by it."(t) And where the guarantor is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not.(u) Where the promissor has for his object a

party making the promise,' it is not within the Statute, and the subsisting liability of the primary debtor is no objection to a recovery. (*Farley v. Cleveland*, 4 Cowen, 432, 439.) Where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties, it is not within the Statute. (*Leonard v. Vredenburg*, 8 John. 39.) These two cases, and the principles there laid down, have been approved

in the case of *Mallery v. Gillet*, 21 N. Y. Rep. 412."

(r) *Connor v. Williams*, 2 Roberts. 50, citing *Mallery v. Gillet* and *Farley v. Cleveland*; see *Ludwick v. Watson*, 3 Or. 256.

(s) See *State Bank v. Mettler*, 2 Bosw. 397, § 71.

(t) *Cowenhoven v. Howell*, 36 N. J. 325.

(u) *Calkins v. Chandler*, 36 Mich. 324, citing cases.

benefit accruing to himself, in which the original debtor has no interest, and from which the latter derives no advantage, the Statute of Frauds does not apply.(v) It has been said that a new consideration even only that of harm to the plaintiff, if moving to the guarantor, will render oral evidence admissible.(w) It is immaterial whether the consideration moves to the promissor from the plaintiff or the original debtor.(x) It is immaterial, also, to whom the promise is made, whether to the party answered for or his creditor, if the consideration moves to a promissor who has a leading purpose in making the promise.(y) That the new consideration is coextensive with the promise and moved not to the original debtor but to the promissor, has been considered a reason for making an exception to the Statute of Frauds.(z) It has also been said that a "promise by a third person to pay the pre-existing debt of another, having immediate respect to and founded upon the original liability, and without any new consideration moving him to pay or answer for such debt," is a collateral undertaking, and unless in writing is within the prohibition of the statute.(a) So it has been said "that high authority might be found to sustain the doctrine, that under no circumstances can a promise to pay the debt of another be enforced, where the original debtor is not discharged; but that there are numerous modern cases in which such promises have been held to be enforceable. The ground upon which the cases go seems to be that there must be a consideration for the promise, personal to the promissor other or different from that which exists or passes between the debtor or creditor, of a substantial character, which of itself is a sufficient consideration for the promise, and which may be assumed

(v) *Dyer v. Gibson*, 16 Wis. 560, distinguishing and explaining *Emerick v. Sanders*. *Sanders*, 1 Wis. 92, citing *Farley v. Cleveland*.

(w) *Ludwick v. Watson*, 3 Or. 256.

(y) *Connor v. Williams*, 2 Roberts. 50, citing *Mallory v. Gillett*, and other cases.

(x) *Mallory v. Gillett*, 21 N. Y. 424; *Cailleux v. Hall*, 1 E. D. Sm. 6; *Meech v. Smith*, 7 Wend. 318; *McLaren v. Hutchinson*, 22 Cal. 190; *Emerick v.*

(z) *Hindman v. Langford*, 3 Strobl. 207.

(a) *Hughes v. Lawson*, 31 Ark. 614.

to be the real and principal inducement to its being made.”(b) A most unqualified statement of the effect to be given to the receipt of a consideration is to be found in a Maryland case, in which it was said that there must be a valid promise to pay, sustained by a sufficient consideration which would be good whether it related to paying the debt of another or an equal sum of money on any other account. The defendant need not realize any benefit; it is enough that he expected to do so, and that a separate consideration moved to him.(c) Before taking up the various modifications which have from time to time been made to the new consideration rule, or noticing those authorities which deny it altogether, it may be well to instance some actual applications of it. Thus where S., whose surety the defendant was, had officially as sheriff been administering the estate of one M. W., of whose unadministered goods the plaintiff was administrator, and it was agreed between the plaintiff and the defendant that if the former would allow S. a certain credit in his account for an amount overpaid, the defendant would pay the plaintiff a certain item of costs taxable against S., which had been overlooked, the Statute of Frauds was held not to apply, because there was a new consideration beneficial to the promissor.(d) In an Alabama case it was said that “if the claimant had rendered himself liable to a suit for damages, for enticing away a servant, and had agreed with the plaintiff to subject his lien as landlord to the other’s lien, note, or mortgage, in consideration of not being sued for damages, the consideration would be sufficient to support the agreement which need not have been in writing.(e) Another example of a resort to the principle now before us will be found in a late Pennsylvania case, where one Thomas, the defendant who had taken real estate “under and subject to a mortgage,” moved to set aside a sheriff’s sale of this property made under the mortgage, and it was claimed that the sheriff’s vendee, who was the mortgagee, had agreed to allow the rule to be made absolute, so as

(b) Walker v. Jones, 10 West. L. J. 319 (Ky.).

(c) Thomas v. Delphy, 33 Md. 379.

(d) Ragland v. Wynn, 37 Ala. 34.

(e) Wells v. Thompson, 50 Ala. 85.

to admit Thomas to bid for the property at a second sale, upon Thomas agreeing to personally assume the mortgage debt; the following point was offered by the defendant, viz., that "even if the jury believe that the defendant, after the first sale by the sheriff, agreed to assume the responsibility of this mortgage, it is a promise to pay the debt of another not in writing, and, under the Statute of Frauds, the plaintiff cannot recover." This was refused because the consideration, *i. e.*, the opportunity to buy at a second sale, moved directly to the defendant, and, on error, the ruling was held to be correct.^(f) Where there was a promise by a friend of the wife, that if the husband will sign certain articles of separation, he, the friend, will pay the husband for the board of the wife's children by a former marriage, and the children boarded with the plaintiff; the court thought the signing by the latter of the separation-agreement took the case out of the Statute of Frauds; but, query, was there any one else liable for the debt, and should not the decision have gone on this ground?^(g) In another case, the defendant claimed as a set-off a parol guaranty, made by the plaintiff who contracted to transport the defendant's goods, that the freight should be partly paid by the plaintiff accepting as a credit a debt which H. M. and J. T. owed the defendant; it was held that there was a new consideration moving to the plaintiff in having employment for the boats, and that, therefore, the Statute of Frauds did not apply.^(h) A promise by the director of a bank to answer for a deposit made therein at the time of a run, and to pay therefor by paying directly to the depositor a debt which he, the director, owed the bank, was held valid, though by parol, because made on a new consideration.⁽ⁱ⁾ In the note will be found cases in which the "new consideration" rule was relied on, but which really came under better settled exceptions to the Statute of Frauds.^(j) There is no sufficient new considera-

(f) *Thomas v. Wiltbank*, 6 W. N. Cas. 479.

(g) *Hughes v. Creyon*, 2 Constit. (So. Car.) 259.

(h) *Meech v. Smith*, 7 Wend. 318.

(i) *Creel v. Bell*, 2 J. J. Marsh. 311.

(j) *Emerick v. Sanders*, 1 Wis. 92; *Lyde v. Higgins*, 1 Smith (English),

305; *Rexford v. Brunell*, 1 N. Y. Leg. Obs. 398 (N. Y. C. P.); *Beaty v.*

Grim, 18 Ind. 132; *Tyler v. Stevens*,

11 Barb. 486.

tion where a bank which had no funds belonging to the drawer of a check promised to pay if the check was sent through the clearing house.^(k) The mere discontinuance of a suit is not such a new consideration as will take a case out of the Statute, the court saying that the security must be something given up by the promisee and acquired by the promissor.^(l)

§ 71. Not only, as we have seen, is the principle of the “new consideration” exception denied in a number of well-considered authorities (§ 66), but it has been so qualified and defined in others, that it is difficult to say just how far it exists at all as an independent doctrine. Thus, in a late Massachusetts case, the court said that “the fact that the defendant derives benefit from the transaction is not alone enough to make it an original promise, for there must always be some consideration to support a mere collateral undertaking.”^(m) And that an engagement is “new,” does not make it “original.”⁽ⁿ⁾ In an early Connecticut case the phrase “new consideration” was used in contradistinction to a promise to pay the original debt, and on the foot of the original contract.^(o) Speaking of a guaranty, the court, in a decision in 2nd Bosworth said: “It is not enough to take such a verbal promise out of the Statute, that it is founded upon some consideration of the value received by the defendant; for, in all cases in which the creditor is not a party to the contract, the consideration must consist of something beneficial to the promissor, or of damage, to which the promisee submits. I do not think there is any such established distinction as that, if the consideration consists of harm to the promisee (the one owing the debt to be paid), the agreement, to be valid, must be in writing, but need not be, if it consists of something beneficial to, and received by the promissor, no matter what

(k) *Morse v. Mass. Bank*, 1 Holmes, 189; 24 How. Pr. 311; *Olive v. Lewis*, 213. 45 Miss. 203.

(l) *Tomlinson v. Gell*, 6 A. & Ell. 569. (n) *Brown v. Weber*, *supra*.

(o) *Turner v. Hubbell*, 2 Day, 457, distinguishing *Tomlinson v. Gill*, Ambl. 415; see *Brown v. Weber*, 38 N. Y. 330, and other cases.

such consideration may be.”(p) The principle is less satisfactorily stated, as follows, in a Missouri case, in which it was said that the “rule laid down in the Massachusetts cases seems to be this: That where the main object of the promise is a benefit accruing directly to the promissor, and which he did not before enjoy, and the promise to pay the debt of another is a mere incident, then the accidental or incidental fact that the promise includes the answering for the debt of another will not bring it within the Statute; but where the main object is to obtain the release of the person or property of the debtor, or other forbearance or other benefit to him, then it is within the Statute, though a new consideration moves directly to the promissor.”(q) Another statement, more elaborate, but not of much more value, is given in an Illinois decision, the court, speaking of a new and original contract to answer for another’s debt, said “it must be founded upon a new and independent or original consideration of benefit to the defendant or harm to the plaintiff moving to the party making the promise, either from the plaintiff or some other person; and the debt or liability of the original debtor must not be the moving cause, or the consideration of the promise, nor the promise, incidental and collateral, to the debt or liability of such original or principal debtor.”(r) In a case in 4th Barbour it was said that the effect of the new contract must be such as to shift the actual indebtedness to the new promissor; so that, as between him and the original debtor, he must be bound to pay the debt as his own, and the original debtor become a mere surety.(s) In Vermont, the rule of *Leonard v. Vredenburg* has been adopted with little change, as the following statement of the law will show: “The promise must not only be based on a valuable consideration, but it must be a consideration moving between the promissor and the promisee, and from which the promissor is to derive some actual or anticipated benefit, in view of which the promise is made.

(p) *State Bank v. Mettler*, 2 Bosw. 397.

(q) *Walther v. Merrell*, 6 Mo. App. 376, citing cases. The Massachusetts cases referred to are those under the

“leading purpose” rule, which will be considered in a moment.

(r) *Hite v. Wells*, 17 Ill. 91.

(s) *Kingsley v. Balcome*, 4 Barb. 132.

When this is the case, it becomes a new and independent contract, existing entirely between the parties to it, and with which the original debtor has no other connection or interest, except that he may be benefited by its performance. It is then a promise to pay the debt of another person not collateral to the debt, or for the benefit of that other person, but in view and in consideration of the benefit to be derived by the promissor therefrom.”(t) In *Mallory v. Gillett* it was thought that if the rule of *Leonard v. Vredenburg* was so far modified as to require that the consideration should move to the new promissor, instead of merely passing *between* the parties to the new contract, the principle was sound, and would cover the case of a receipt of funds.(u)

§ 72. The doctrine that a new consideration moving to the promissor will take the promise out of the Statute of Frauds, merges insensibly in a rule presently to be considered, namely, that where the promissor has a leading purpose of personal advantage in making the promise, the latter is not a mere guaranty. The following statement in a Kentucky case seems to blend both views: the court said, “That if there be something substantial in the transaction besides the debt and the stipulations with respect to it, which is itself a sufficient consideration for the promise, and which may be assumed to be the real and principal inducement to its being made, then the promise being founded on some new consideration arising between the creditor and the party promising, and collateral to the original debt, may, perhaps, be regarded as not being a mere promise to pay the debt of another, and as not being within the interdict of the statute, although it be in terms a promise to pay the debt of another, and although its performance will discharge that debt.” v) The latest and best supported of all the attempts that have been made to validate an oral guaranty on the ground of its new and independent consideration, is the one just referred to, viz., that where the promissor has a leading

The “leading purpose” rule; general statement.

(t) *Cross v. Richardson*, 30 Vt. 647.

(u) *Mallory v. Gillett*, 21 N. Y. 413, citing *Farley v. Cleveland*; see *Kelsey*

v. Hibbs, 13 Oh. St. 352; see *Stewart v. Campbell*, 58 Me. 441; see § 67.

(v) *Lieber v. Levy*, 3 Metc. (Ky.) 292.

purpose of his own to accomplish by the guaranty, the latter becomes a personal obligation of his, to which the responsibility for the person whose debt is guaranteed is a mere incident.^(w) This doctrine can be most fairly stated in the language of its own advocates, and from these statements it will be seen in several instances how little the application of it differs from the other undisputed exceptions to the Statute of Frauds, such as the "Funds" rule; the "discharge of the original debtor" rule, etc. But there are undoubtedly a number of cases which do not come within these latter categories, and can only be supported on the theory that the promissor under the circumstances, regarded the guaranty as his own promise in substance, and merely in form an undertaking for the third person. The decisions of the Supreme Court of Massachusetts are the most emphatic in their approval of the doctrine of the "leading purpose," and as we have seen, go to a further extent than any other court in supporting the sufficiency of a mere new consideration if it passes directly to the promissor. Thus, Chief Justice Shaw said: "The rule to be derived from the decisions seems to be this: the cases are not considered as coming within the Statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit, it is within the Statute."^(x) The later authorities do not go as far as this, and in a decision in 106th Massachusetts, the court said: "We think the authorities in the state have gone no further than to decide that a case is not within the Statute, where, upon the whole transaction, the fair inference is, that the leading object, or purpose, and the effect of the transaction was the purchase or acquisition by the promissor from the promisee of some pro-

(w) *Turner v. Hubbell*, 2 Day, Lawson, 31 Ark. 613; *Fitzgerald v. Mor-*
 459 (explaining *Tomlinson v. Gill*); *risey*, 15 N. W. Rep. 353 (S. C. Neb.);
National Bank v. Kinner, 1 Utah, Lee *v. Newman*, 55 Miss. 370; see
 102; *Rarey v. Cornell*, 2 West. L. M. § 93.
 415 (Franklin Dist. Ct. Wis.); *Shel-* (x) *Nelson v. Boynton*, 3 Metc. (Mass.)
don v. Butler, 24 Minn. 515; *Connor* 400; in fact the promisee surrendered
v. Williams, 2 Roberts. 49; *Hughes v.* a lien.

erty, lien, or benefit which he did not before possess, but which enured to him by reason of his promise, so that the debt for which he is liable may fairly be deemed to be a debt of his own, contracted in such purchase, or acquisition.”(y) In a Texas case, the law is thus stated: “Where the promisor intends not only to pay the debt of another, but his object is to subserve some purpose of his own, his promise does not lie within the Statute of Frauds, although it may be in form a promise to pay, and its performance may incidentally discharge the liability of another.”(z) The rule has also been laid down as follows: “The distinction is between cases where the person promising has for his object a benefit accruing to himself, in which the original debtor has no interest, and from which he derives no advantage, and when his primary and leading object is to become surety for the debt of another, without benefit to himself, but for the exclusive advantage of the other parties to the contract. The former is regarded as an undertaking by the promisor to answer upon his own contract or to pay his own debt, being a guaranty in form merely, and not within the intent of the statute; the latter as a purely collateral agreement, and void, unless the requirements of the statute are complied with.”(a) The Supreme Court of the United States has said: “Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the Statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.”(b)

(y) *Ames v. Foster*, 106 Mass. 402, citing cases. See *Draper v. Putnam*, 7 Allen, 174; *Jepherson v. Hunt*, 2 id. 421; *Connor v. Williams*, 20 Roberts. 50; see, also, *Arnold v. Stedman*, 45 Pa. St. 188.

(z) *McCreary v. Van Hook*, 35 Tex. 639, citing cases. See *Mills v. Brown*, 11 Ia. 317, to the same effect. See,

also, *Carothers v. Connolly*, 1 Montana, 436 (the case of a surrender of a lien).

(a) *Dyer v. Gibson*, 16 Wis. 560.

(b) *Emerson v. Slater*, 22 How. 35, citing several cases, and giving the facts as follows:—

“By the terms of the instrument, the plaintiff covenanted and agreed with the defendant in consideration of the

§ 73. Where a note was given for certain work done upon the shop of one A., and the defendant had an interest in the latter's business, though it did not appear what that interest was, or whether it could have been made liable for the work in question, the District Court of Philadelphia held, that a guaranty of A.'s note given in consideration of a forbearance of suit thereupon, was not within the Statute of Frauds, Hare, J., saying: "The weight of authority would seem to be, that when a promise to be answerable for the debt of another is based not only upon a new consideration, but upon a consideration which moves to and benefits the promissor by inducing delay in the institu-

Examples
of the
leading
purpose
rule.

agreements of the latter therein contained, and of one dollar to him paid, that he, the plaintiff, would complete all the bridge work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the rails for one track, by the first day of December next after the date of the contract. In consideration whereof the defendant agreed that he would pay the plaintiff, within two days from the date of the agreement, the sum of forty-four hundred dollars in cash; and also give to the plaintiff, on the completion of the bridges, and when the rails for one track were laid from Dedham to the foot of Summer Street, in Boston, his, the defendant's, five notes for two thousand dollars each, dated when given as provided, and made payable to the plaintiff or order in six months from their date. Another stipulation of the agreement was that the notes, when paid, were to be applied towards the indebtedness of the railroad company to the plaintiff, and that the agreement was in no way to affect any contract of the plaintiff with the railroad, or any action then pending between them.

"On its face it purports to be a contract between the parties for their own

benefit; one agreeing to do certain work and furnish certain materials, and the other agreeing to pay therefor a stipulated compensation. Their promises are mutual, and in one respect dependent. In consideration that the plaintiff engaged to do the work and furnish the materials by a given day, the defendant on his part agreed among other things when the work was completed to give the plaintiff the five notes therein described. Reference was made to the contract of the plaintiff with the railroad company in the first instance as descriptive of the work to be done, and of the materials to be furnished; and in the second instance doubtless for the reason that as a part of the transaction the company had placed, or agreed to place, securities in the hands of the defendant to indemnify him for the liability he thereby assumed to the plaintiff. Part of these securities were delivered over to the defendant at the time, and the residue as soon thereafter as the conveyances could conveniently be made. But when we consider the attending circumstances, the presumption is much stronger that the arrangement was one mainly, if not entirely, for the individual benefit of the defendant."

tion of proceedings, that might otherwise sweep away his property, or break up a business in which he is interested, the obligation is in fact his own debt, notwithstanding its form, and consequently not within the Statute of Frauds.”(c) The following also are examples of the “leading purpose” rule: Where a landowner promised an occupier of land in the parish to indemnify him for resisting a vicar’s suit for tithes, the Statute of Frauds was held not to apply, as the promissor wished the question of the tithes to be settled; there was, it is true, another ground for the decision, and an irrefragable one—viz., that there was no one else liable to the promisee for the costs and expenses of the suit, and therefore the defendant’s promise was collateral to nothing.(d) Thus, where the defendant, the first endorser of a note (the protest of which was informal and invalid, thereby discharging the party so endorsing), promised the plaintiff, a bank, whose rule it was to refuse credit to any person whose paper held by them was protested, that if they would not enforce this rule, but give him credit in other transactions, he would waive the informality of the protest, and pay the note, it was held that the promise was original, and not a guaranty within the Statute of Frauds, the court taking the view that though his liability had been discharged, yet he continued to be obnoxious to the rule of the bank, in that he was on paper which he refused to honor, and in consideration of being relieved of this he engaged to pay the debt which he had formerly contracted.(e) So the Statute of Frauds has been held not to apply where the object of the promise was to get hold of funds which should be security to the promissors as to a liability undertaken by them for the person answered for.(f) The common

(c) *Hopkinson v. Davis*, 5 Phila. 147, citing cases.

(d) *Adams v. Dansey*, 6 Bingh. 506.

(e) *Uhler v. Farmers’ Nat. Bank*, 64 Pa. St. 409, distinguishing *Maule v. Bucknell*; see *U. S. Bank v. Southard*, 2 Harr. (N. J.) 474.

(f) *State Bank v. Mettler*, 2 Bosw. 397. Thus, where one S. owned land, and had negotiated a loan to be secured

on the latter, and the defendant held on it a third mortgage, it was agreed that the loan should be transferred to the defendant, who wanted the money in order to buy in the property under a foreclosure sale made upon a prior encumbrance, and that the defendant should pay the expenses of raising the loan, the examination into the title, etc. The defendant afterwards bought

instance of a "leading purpose," is the inducement to give the guaranty which comes from a desire to obtain possession of property, either real or personal, to which the promissor has strictly no claim, but which it is his interest to hold. Thus, where one McG., a broker, who received money from the defendant to be invested in bonds, and who also owed money to the plaintiff, gave the latter a check post dated, and told him that he would secure him by deposit of bonds; these bonds, which were transferable by delivery, and which he deposited, were bought with the defendant's money, but had not been delivered, being only marked with the defendant's initials in pencil; McG. told the latter of this transaction, and he proposed if McG. would give him an order to get the bonds from the bank, he would pay over-drafts of McG. due the bank, and also the plaintiff's check; he paid the bank's debt and got the bonds, but refused to pay the plaintiff. The "leading purpose" was made the reason of a decision holding the oral promise valid.(g) A promise to answer for the amount of checks drawn by G. S. & Co., in consideration of the promissor's contract with G. S. & Co. being completed by means of the amount thus obtained, is not within the Statute of Frauds.(h) And where the defendant, in order to get his house speedily finished, promised to pay the plaintiff, a plasterer, the latter having received no pay from the defendant's contractor, the Statute of Frauds was held not to apply.(i)

in the land, but refused to pay the plaintiffs their bill for services, etc., incurred in getting the loan for S.; it was held that the Statute of Frauds was no defence; *Benedict v. Dunning*, 1 Daly, 242.

(g) *Small v. Schaefer*, 24 Md. 156; the desire to obtain a person's services may be a sufficient object; *Goolsby v. Bush*, 53 Ga. 355.

(h) *Lefevre v. Farmers' Bank of Shippensburg*, 2 W. N. Cas. 174; see this case below, 29 Leg. Int. 276.

(i) *Clifford v. Lühring*, 69 Ill. 401, distinguishing *Hite v. Wells*; but see

infra. The following not altogether satisfactory ruling can be, perhaps, better supported on the "leading purpose" principle than any other: The defendant was informed by the plaintiff that he, the latter, would no longer trust one R., then in debt to him; and the defendant told him to furnish R. with goods; that R. was working with or for him, the defendant, and that he, the latter, would pay for the goods if R. did not; thereupon the plaintiff sold to R.; the Statute of Frauds was held not to apply; *Hartley v. Varner*, 88 Ill. 562, citing *Williams v. Corbet*,

Where the defendant's promise to pay the debt due to the plaintiffs by a certain third person, in order to obtain possession of security, such as a ship, to cover their own claim against the third person, the Statute of Frauds does not apply.^(j) Where the plaintiff—who having under a judgment against D., levied on, sold, and bought in hay, etc., on a farm, of which D. was the tenant and defendant the owner—agreed not to remove the hay if the defendant would pay the judgment, the Statute of Frauds does not apply.^(k) A promise to pay the expenses of a suit to test the liability of one who was on a note assigned by the defendant to the plaintiff, is not within the Statute of Frauds, as the defendant's object was to get his note paid, and this the plaintiff, by his suit, undertook to attempt; but the case also comes better^(l) within another head, viz., that a guaranty of a claim assigned in payment is not within the Statute (see § 114). And so often does it happen that there exists some reason for taking a given contract out of the Statute of Frauds other than the fact of a new consideration or a leading purpose that all cases cited for these theories should be closely looked at. Under another head will be discussed the question of how far a guaranty in consideration of a lien surrendered by the promisee to the promisor is taken out of the Statute of

Hughes v. Atkins; this case is criticized as being one of plain guaranty in 11 Chic. Leg. News, 196.

(j) *Connor v. Williams*, 2 Roberts. 50. Where the owner of a vessel, which was to carry certain goods for the defendant, gave the plaintiff—who thereupon became surety in an attachment against the vessel—an order on the defendant for the amount of freight to be earned, and the defendant agreed to satisfy the claim which was the ground of the attachment, and the vessel was released, the goods carried, and the freight earned, the defendant was liable, notwithstanding the Statute of Frauds; *Doane v. Newman*, 10 Mo. 69.

(k) *Cooper v. Wait*, 8 N. Y. W. Dig. 367 (S. C., N. Y.); see *Scott v. White*,

71 Ill. 288. So where the declaration stated that I. A. had made a bill of sale of goods to the plaintiff (whether absolutely or by way of mortgage did not clearly appear), and the plaintiff being about to sell the goods, the defendant promised, if he would forbear, to pay I. A.'s debt; it was held that under the declaration and the imperfect evidence in the case, the court would not say that the case was one within the Statute of Frauds; in this instance there seems to have been what is more definite than a mere leading purpose, i. e., the surrender of a lien; *Barrell v. Trussell*, 4 Taunt. 120.

(l) *Brantley v. Carter*, 26 Missi. 285; see *Whitesell v. Heiney*, 58 Ind. 112.

Frauds, and there will there be found instances where the benefit which was relinquished by the promisee and obtained by the promissor, while not strictly a lien, was a tangible advantage of some sort. These latter instances might come, perhaps, within the "leading purpose" rule also. Thus, where there was a claim upon which an attachment against certain logs had been issued, and the defendant agreed to pay this in consideration of a release of the attachment, it was held that the Statute of Frauds did not apply, because the original debtor had taken no part in the arrangement, and because the defendant, who was desirous of buying the goods, had in view the removal of the plaintiff's competition, and wanted the goods completed, which could not be done while the levy held.⁽ⁿ⁾ The strongest case of this class was as follows: The plaintiff had a claim against H. & D., which he was about to secure by an attachment of their property, when the defendant, who had against H. & D. a larger claim than the plaintiff, promised that if the plaintiff would not attach and make costs, he, the defendant, would pay to the plaintiff the debt of H. & D. The plaintiff forbore, and assisted the defendant in securing the latter's debt by an attachment. The court, per Redfield, J., comparing this case to that of the surrender of a lien, held it a new contract, the interest of which was chiefly to the defendant, and though H. & D. remained liable to the plaintiff, the defendant's promise was an original one, and not within the Statute of Frauds; the point being made that the original debtor was not interested in the new arrangement. It is to be noted that the defendant's engagement seems to have been absolute in form, yet as there can be no doubt that if the plaintiff had got the amount from H. & D. the defendant would have been discharged, the latter substantially answering for H. & D.'s failure to pay.^(o)

§ 74. The "leading purpose" rule has not met with universal approval, and the cases where it has been applied may, in the greater number of instances, be shown to come within other exceptions to the Statute of Frauds.^(p) There is, moreover, a plain con-

Leading
purpose
rule ques-
tioned.

(n) *Cross v. Richardson*, 30 Vt. 647.

(p) *Throop on Verb. Agr.*; *Browne*

(o) *Lampson v. Hobart*, 28 Vt. 697. on S. of F.; *Law Mag. and Rev.* vol.

flict on the point, and decisions are to be found which cannot be reconciled with such rulings as that, for example, of *Lampson v. Hobart*, just cited. Thus, where a plaintiff was engaged in buying wool with one W., on the latter's account, and pending this, the plaintiff let W. have on a certain draft \$900; the draft turned out a forgery, and W. absconded; the defendants were employed by the plaintiff, W., to buy wool for the latter; part of the \$900 was used to pay for the wool, and for the rest of the wool bought by the defendants, they, the latter, were liable; the wool remained in their possession, and it was agreed between them and the plaintiff that the latter should not attach the wool, and that both should act together in securing themselves out of the wool for what they had paid out and for what they were liable; the defendants thereupon verbally promised to pay the plaintiff so much of the amount of the \$900 lent by the plaintiff to W., as had been spent upon the wool. It was held that W.'s liability subsisting, the Statute of Frauds applied.^(q) So where the defendant retained the plaintiff as his counsel, and in consideration that he would so act, promised to pay a debt due him, the plaintiff, by the defendant's brother; the latter's liability continuing the Statute was held by the court to apply in this case.^(r) In a Maine decision it was said that the fact that the defendant promised to pay the plaintiff for materials required in a building erected by the person answered for,

xxxii. 3d series, 96, see *Lang v. Henry*, 54 N. H. 59, a non-committal case; see *Wilson v. Hentges*, 29 Minn. 103.

In *Maule v. Bucknell*, 50 Pa. St. 50, speaking of the "Funds" rule, the court said that "except in such cases, and others perhaps of a kindred nature, in which the contract shows an intention of the parties that the new promissor shall become the principal debtor, and the old debtor become but secondarily liable, the rule," etc., is that while the old debt remains the promise is within the Statute. See *National Bank v. Kinner*, 1 Utah, 102;

Rarey v. Cornell, 2 West. L. Monthly (Wis. Franklin Distr. Court).

(q) *Waldo v. Simonson*, 18 Mich. 345.

(r) *Fullam v. Adams*, 37 Vt. 391; the court discussing the law of guaranty with great elaboration, thought apparently that the "Funds" exception included all the sound cases. So a promise by a mother to pay her son's debt if the attorney who was collecting it would act as her counsel and get her appointed administratrix of her son, was a guaranty within the Statute of Frauds. She had paid the lawyer separately for his service. *Marton v. Black*, 21 Ala. 729.

because he, the defendant, wanted to sell goods to such third person, was no reason why the Statute of Frauds should not apply.^(s) Where a tenant assigned his lease, the assignee promised the landlord that if he would assent to the assignment, he, the assignee, would pay the assignor's arrears, it was held that the Statute of Frauds applied.^(t) Where one had sold a boat, for the repairs of which suit had been brought, and had no property therein, but in his promise to pay for the repairs he had stated that he wanted the boat finished as soon as possible, the Statute of Frauds was held to apply.^(u) There is an important category of cases to be treated of presently which are quite inconsistent with the "leading purpose" rule; those namely where the Statute of Frauds has been held to be a good defence to the owner of land, who, in order to procure completion of a building to be put thereon, has promised to pay debts due by his contractor to workmen employed in the erection of it.^(v) A parol promise to pay to the plaintiff the board bills of certain third persons, in consideration that they should work for the defendant, is within the Statute of Frauds.^(w) Where the plaintiff was required to supply C. & Co. with articles necessary to finish a bridge; and the defendant had made advances to C. & Co., and taken as security an assignment of their interest in the bridge, so that he was interested to have the bridge finished; the defendant promised that if the plaintiff would give C. & Co. credit, and allow him, the defendant, three per cent., he would pay, in

(s) *Doyle v. White*, 26 Me. 349. Where one Edwards and one Eltien were sued for the price of meat sold to Edwards, who kept a boarding-house, the court said "the only pretence, so far as we can discover, for saying that Eltien acquired the use of, or a beneficial interest in the meat, is based upon the ground that Eltien, as an attorney-at-law, held certain claims against Edwards, which he had been employed to collect, and it was talked and understood between him and the plaintiffs, that the furnishing of meat by them to Edwards, so as to enable him to run his boarding-house, would

facilitate Eltien in collecting the claims which he had been employed to collect. But that certainly did not give Eltien such interest in the meat as to make him joint purchaser." *Beerkle v. Edwards*, 8 N. W. Rep. 342 (S. C. Ia.).

(t) *Fowler v. Moller*, 4 Bosw. 154.

(u) *Larson v. Wyman*, 14 Wend. 246.

(v) *McDonell v. Dodge*, 10 Wis. 110; *Payne v. Baldwin*, 14 Barb. 571; *Clay v. Walton*, 9 Cal. 333 (in which, however, the "leading purpose" rule was said to be sound); *Ellison v. Jackson Water Co.*, 12 Cal. 553.

(w) *Reynolds v. Carpenter*, 3 Chand. 31; 3 Pinn. 34.

cash, the debt of C. & Co.; it was agreed that he, the defendant, was to get the bill of the plaintiff, as accepted by C. & Co. The Statute of Frauds was held to apply, as the promise was a mere guaranty.^(x) Where W., owing the plaintiff money, agreed to work it out for him; and when the plaintiff called upon W. to work, he was working for the defendant, who promised to pay the debt and kept W., it was held that as W. was not discharged from the original debt, the defendant's promise was within the Statute of Frauds.^(y) A promise to pay for supplies furnished a third person who boarded the promissor's laborers, is an ordinary guaranty within the Statute of Frauds.^(z) Even in Massachusetts, the "leading purpose" rule does not apply to a guaranty in consideration of a promise not to attach property which was not subject to attachment.^(a) A count that W. was indebted to the plaintiff, and that the defendant having hands at work for him, promised in consideration that the plaintiff would advance to them goods on the defendant's account to pay for these goods and pay W.'s debt, and the plaintiff so advanced, shows a contract within the Statute of Frauds.^(b) So where the defendant, a

(x) *Mallett v. Bateman*, 16 C. B. N. S. 543; 10 Jur. N. S. 865; 10 L. T. N. S. 869. So where a promise was made by the defendant to the plaintiff, that if he, the plaintiff, would hasten to finish work he was doing for B., he, the defendant, would settle for what would be due on the account; the plaintiff, who had previously charged the goods to B., now charged them to B. & Co., meaning to include the defendant; the Statute of Frauds was held to apply; the defendant was lending money to B. to make horse-rakes, for which the plaintiff was making castings. The defendant was to be paid all the profits till the loan was repaid, and was, therefore, interested to have the rakes finished and sold; *Eshelman v. Harnish*, 76 Pa. St. 97.

(y) *Stone v. Symmes*, 18 Pick. 469.

(z) *Cahill v. Bigelow*, 18 Pick. 370.

(a) *Ames v. Foster*, 106 Mass. 402; see as another example of a guaranty

not within this rule, *Davis v. Caverly*, 120 Mass. 415.

(b) *Eddy v. Roberts*, 17 Ill. 505. Where one Steele, who, with Crosby and others, were sued by the plaintiff, bought lands of C., and gave him notes therefor; the other defendants formed with Steele a partnership, and bought from him an interest in his purchase from C. C. was debtor to the plaintiff on a note and mortgage on other land (*semble*, because the plaintiff might have used his claim against C., so as to create an encumbrance on the lands bought by Steele from C.), that the plaintiff should cancel his claim on C., and take an assignment of Steele's notes given to C., and these notes the defendants guaranteed. The plaintiff carried out his part and took the notes guaranteed; it was held that the Statute of Frauds applied, as Steele continued liable; *Crosby v. Jerolman*, 37 Ind. 270.

widow, promised to pay her husband's debt, and, at the same time, the plaintiff agreed to sell to her goods on credit, it was held that the Statute of Frauds applied, as the defendant had no interest to subserve by paying her husband's debt, and as her own credit was good.(c)

(c) *Pfeiffer v. Adler*, 37 N. Y. 164. So where C. was working for the defendant and needed pay, D. said to a messenger whom C. sent the defendant telling him of his need: "you can tell C., or any one that will supply him with hay, that I will accept C.'s note, payable in the spring." This was communicated to the plaintiff, who supplied C. It was either a contract relating to chattels or a guaranty (*semble*

the latter) and was within the Statute of Frauds; *Cohrell v. Hatfield*, Stev. N. B. Dig. 691. A promise by a bank president to a depositor, to guarantee the latter's deposit if he will not draw it out, is within the Statute of Frauds; the incidental advantage to the defendant as officer and stockholder in the bank is too slight; the advantage all accrued to the bank; *Walther v. Merrell*, 6 Mo. App. 576.

CHAPTER IV.

THE PARTIES TO THE GUARANTY.

III. THE PARTIES TO THE GUARANTY.

§ 75. Del credere agency.

§ 76. Promise to the debtor.

§ 77. Examples of promise to debtor.

§ 78. Promise to debtor, the guarantor having funds, or being indebted to the promisee.

§ 79. "Promise to debtor" rule denied.

§ 80. The creditor cannot sue on the promise made to the debtor.

§ 81. Cases holding that a creditor cannot sue even when the guarantor has funds, and this applied where the promise was made to the debtor.

§ 82. The rule that the creditor can sue under these circumstances.

§ 83. Creditor can sue, it has been held, though there are no funds, if the promise has been made to the debtor.

§ 75. THE next of the principal heads of the division of the subject of guaranties, as laid out in the beginning of chapter III., is that of the parties to the contract.

The first of the points relating to this branch which may be considered is that of the agreement of a del credere agent. After doubt and some contrariety of decision it is now settled that such a promise is not within the Statute of Frauds.^(a) In an early case in England it was held that the del credere commission is absolute; that to the broker the credit is given, not to the third party, and that he is liable in the first instance.^(b) Lord Ellenborough, however, took a different view of the subject, and said that a del credere agent was one who was paid for giving a guaranty, but that he was still a factor and not a principal, and that the practice of looking only to the agent must have prevailed only in the case of a foreign principal, and that even as to him the law was the

(a) See *Gall v. Comber*, 7 Taunt. 558; 1 J. B. Moore, 279, as to how far a del credere agent's promise differs from a guaranty; see *Thompson v. Perkins*, 3 Mason, 232; see, however, *Law Mag. & Rev.* vol. xxxii., 3d ser., 108.

(b) *Groves v. Dubois*, 1 T. R. 115; see *Bize v. Dickason*, 1 T. R. 285.

same.(c) The *del credere* agent, while at first sight a mere guarantor, is not really so; the persons answered for are not known to the employer, and the agent's liability does not arise from a specific promise in each case, but from a general status, which results from the nature of the continuing relation between himself and his principal, and on the ground of which he may receive fixed pay; he is a fiduciary, and not a promissor. The law on this point was first established in America, and then followed in the leading case in England; the court of exchequer, speaking of the defendants, said: "Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, mainly responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them, and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given, and the case resembles, in this respect, those of *Williams v. Leper*, 3 Burr. 1806, and *Castling v. Aubert*, 2 East, 325. We entirely adopt the reasoning of an American judge (Mr. Justice Cowen), in a very able judgment on this very point in *Wolff v. Koppel*."(d) Page Wood, V. C., considered this doctrine in a case where the facts were as follows: There was a contract, by which F. & Sons sold iron as agents for the plaintiff's company, giving the invoice in the name of the company, and on the understanding that the buyers of the iron were

(c) *Morris v. Cleasby*, 4 M. & S. 575, criticizing Lord Mansfield's and Judge Buller's remarks in *Grove v. Dubois*, 1 T. R. 112; citing *Houghton v. Matthews*, 3 B. & Pull. 489; see *Peele v. Northcote*, 7 Taunt. 478.

(d) *Couturier v. Hastie*, 8 Exch. 56; 22 L. J. Exch. 97; see 49 Law Mag. 370. See opinion of Willes, J., in *Mallett v. Bateman*, 16 C. B., N. S., 543; L. R. 1 C. P. 170.

debtors of the company (in the books of F. & Sons the iron sold on behalf of the company was only distinguished from other iron sold by F. & Sons themselves by being designated "Low Moor Iron," the kind produced by the company), and by which contract F. & Sons became liable for the price of the iron; it was held to be neither a guaranty, nor a *del credere* engagement, but a direct and primary liability.^(e) The law in America may be said to begin with Judge Cowen's decision already cited; in that case it was held "that the engagement is one not to sell to any but solvent persons; that a *del credere* agent can be sued as for goods sold, though the usual way was on the special engagement, and that if a factor were to engage to sell for cash, and yet actually sold on credit, his engagement would not be within the Statute of Frauds. The debt of the third party comes in incidentally as a measure of damages."^(f) In the Massachusetts decision, cited by Judge Cowen, the contract was that the agents were liable for the price when sale was made, if for cash; when the price was due, if on credit; and the vendor, if the agent is insolvent, could notify the vendees not to pay the agent, but to pay him, the vendor; this, under these circumstances, would make the agent's agreement collateral, but the rule has never been applied to a *del credere* agent.^(g) In a decision in New York, made after *Wolff v. Koppel* had been decided, but before its adoption in England, the court said: "The different and contrary results are produced by the different views of the contract in the two countries. In England they understand the guaranty to be a contract to pay, if the money cannot be collected of the purchaser. Here it is understood to be a contract directly with the principal to pay him on the expiration of the time of credit, whether the purchaser be solvent or not; that is the whole contract between the factor and his principal, and is an original undertaking without any relation to the debt or liability of another. The law (not the contract of the parties) then adds

(e) *Wickham v. Wickham*, 2 K. & J. 486, considering that *Couturier v. Hastie* held a contract with a *del credere* agent to be a new and primary engagement.

(f) *Wolff v. Koppel*, 5 Hill, 458, questioning *Morris v. Cleasby*, noticing *Gall v. Comber*, and relying on *Swan v. Nesmith*.

(g) *Swan v. Nesmith*, 7 Pick. 223.

a quality to such a transaction, that although the factor may sue the purchaser in his own name, the principal has, also, his right to sue. This, however, does not convert an express original undertaking of the factor with his principal absolutely to pay the debt at maturity into a collateral and conditional agreement to pay it if the purchaser does not. A guaranty by a factor differs very especially from a promise to pay the debt of another in another particular: the principal transfers a right, although not the exclusive right, to the factor to sue for and recover the money in his own name, and to collect the debt and hold the money, accounting only for the net balance of account between the parties. Thus, the debt of the purchaser is, to some extent, made the property of the factor, and he, to that extent, becomes the purchaser of it, and so far substitutes his liability in place of that of the purchaser. The effect of this generally is to make the factor practically the owner of the debt, and this is almost invariably so if he remains solvent, and on just terms with his principal. Then the principal is unknown to the purchaser.”(h) It has been said, also, that the *del credere* agent is not a guarantor of the remittance of the money.(i) In a Federal decision, holding a *del credere* engagement as an absolute promise not within the Statute of Frauds, the court, though assuming that the law of Massachusetts was the same, said that this was a question of commercial law, and that the United States court was not bound by a state decision, even that of the place where the contract was made.(j) In a late Missouri case it was said that the factor’s promise arises from his own duty and responsibility, and that the liability to pay a third person’s debt is a mere incident, and saying the principal case would tend to show that rule impolitic.(k) So, it has been held, that where an auctioneer was alone trusted, a verbal warranty

(h) *Sherwood v. Stone*, 14 N. Y. 269, 17, citing *Leverick v. Meigs*, 1 Cow. 646.
citing *Groves v. Dubois and Bize v. Dickason*, 1 T. R. 285, as favoring the

rule of *Wolff v. Koppel*, and *Morris v. Cleasby*; and *Peele v. Northcote*, 7 Taunt. 478, as *contra*.

(i) *Cartwright v. Greene*, 47 Barb.

(j) *Bradley v. Richardson*, 23 Vt. 731 (U. S. D. C.).

(k) *Suman v. Inman*, 6 Mo. App. 385, citing *Wolff v. Koppel* and other cases, and denying *Morris v. Cleasby*.

of title by him is not within the Statute of Frauds.^(l) Where the defendants were selling goods for the plaintiff on commission, and were bound by their mutual arrangement to sell to none but responsible persons, and to endorse or otherwise make secure all notes taken by them from persons considered irresponsible by the plaintiff; they had taken certain notes which the plaintiff refused to receive; then, in order to induce the plaintiff to take the notes and to credit the amount of the latter on their debt to the plaintiff, they guaranteed the notes: the Statute of Frauds was held not to apply. This really depends on another principle (see § 127), but it has some of the features of a *del credere* contract.^(m) Where the plaintiff sued for services as salesman and collector of the debts of persons to whom he made sales, and the defence was that the plaintiff was to be liable for debts not collected, it was held that the agreement in question, if the verdict of the jury had found it was made even orally, was clearly an original contract between the parties to the action. It was a substantial and essential fact of the consideration; in no sense a collateral undertaking; but, on the part of the employé, direct and immediate, and founded upon a consideration, *i. e.*, the employment moving between the parties themselves.⁽ⁿ⁾ Every commission contract is not, as we have seen, a *del credere* agency, thus a verbal undertaking by a broker selling on commission to guarantee all sales is a collateral undertaking, and within the Statute of Frauds.^(p) So, where a commission merchant verbally guarantees the proceeds of a sale made by him, the promise is within the Statute of Frauds.^(q) Where

(l) Schell *v.* Stephens, 50 Mo. 380, citing cases.

(m) Sheldon *v.* Butler, 24 Minn. 515.

(n) Schwab *v.* Elias, 2 N. Y. Cod. Proc. Rep. 341.

(p) Canmann *v.* Brunswick, 3 Mo. App. 586.

(q) Rowland *v.* Bull, 5 B. Mon. 149. So, where the plaintiff was a broker, acting for O. P. & Co., under an arrangement by which he was to sell for

cash, or to be responsible personally when he sold on credit, it was held that the real party in interest was O. P. & Co., and that the plaintiff, under Indiana statutes, 2 R. S. 1876, §§ 3 and 4, could not sue, that the verbal contract was *semble* invalid under the statutes of Indiana; at any rate, it could not operate to vest the right to the debt in the plaintiff; Smock *v.* Brush, 62 Ind. 156, 176. See Nichols *v.* Allen, 22 Minn. 283.

a non-professional person agrees to collect debts, and it is verbally stipulated that he shall get his pay out of the debtor, oral evidence is admissible under the Scotch law.(r)

§ 76. Another important exception to the Statute of Frauds is the case of a promise to pay another's debt, made not to the creditor, but to that other; this engagement, both in England and America, is, with little dissent, regarded as not being a guaranty with the terms of the Statute.(s) In Kentucky the plaintiff's petition must state that the promise was made to the debtor.(t) It has been said that in order that the Statute of Frauds shall apply, there must be a debt due by the third person to the promisee.(u) Besides the authorities cited in the last note, the English case of *Thomas v. Cook* is always relied upon as supporting the same rule.(v) This comes rather within the rule to be discussed later, viz., that where one bound, or about to be bound in an indebtedness, asks the plaintiff to share the obligation, and promises to indemnify him, it is a promise to pay the promissor's own debt; and, therefore, not within the Statute

Promise to
the debtor.

(r) *Moserip v. O'Hara*, Court. Sess. Cas. 4th series, vol. viii. p. 37, distinguishing *Taylor v. Forbes* (see § 5) as the case of a professional person.

(s) *Eastwood v. Kenyon*, 11 A. & E. 445; see *Phelps v. Clasen*, 3 Nat. Bank Reg. 22; 2 West. Jur. 224; *Pratt v. Humphreys*, 22 Conn. 325; *Mathers v. Carter*, 7 Bradw. 226; *Eddy v. Roberts*, 17 Ill. 505 (dictum); *Wilson v. Bevans*, 58 Ill. 234; *Colter v. Frese*, 45 Ind. 104; *Hardy v. Blazer*, 29 Ind. 227; *Crim v. Fitch*, 53 Ind. 215; *Kauffman v. Harstock*, 31 Ia. 473; *Center v. McQuesten*, 18 Kan. 479; *Spadone v. Reed*, 7 Bush, 457; *Williams v. Rogers*, 14 Bush, 781; *North v. Robinson*, 1 Duval (Ky.), 71; *Davis v. Wiley*, 3 Kent, L. Reporter, 755; *Tarr v. Northey*, 17 Me. 113; *Jones v. Hardesty*, 10 Gill & J. 404; *Colt v. Root*, 17 Mass. 229 (A. D. 1821; *Eastwood v. Kenyon*, was only decided in 1840); *Weld v. Nichols*, 17 Pick.

538; *Preble v. Baldwin*, 6 Cush. 552; *Alger v. Scoville*, 1 Gray, 391; *Aldrich v. Ames*, 9 Gray, 76; *Hubon v. Park*, 116 Mass. 542; *Pratt v. Bates*, 40 Mich. 38; *Goetz v. Foos*, 14 Minn. 267; *Flemm v. Whitmore*, 23 Mo. 430; *Howard v. Coshow*, 33 Mo. 123; *Tibbetts v. Flanders*, 18 N. H. 290; *Fiske v. Gregory*, 34 N. H. 418; *Apgar v. Hiler*, 4 Zab. 816; *Allaire v. Ouland*, 2 John. Cases, 56; *Barker v. Bucklin*, 2 Denio, 59; *Doolittle v. Naylor*, 2 Bosw. 224; *Mersereau v. Lewis*, 25 Wend. 247; *Westfall v. Parsons*, 16 Barb. 645; *Hockaday v. Parker*, 8 Jon. (No. Car.) 18; *Oliphant v. Patterson*, 56 Pa. St. 368; *Peck v. Thompson*, 15 Vt. 637.

(t) *Davis v. Wiley*, 3 Kent, L. Reporter, 755.

(u) *Hargreaves v. Parsons*, 13 M. & W. 570; see *Poucher v. Treahey*, 37 U. C. Q. B. 370.

(v) 3 Man. & R. 448; 8 B. & C. 732.

of Frauds; and the fact that a third person is to be surety jointly with the promissor and the plaintiff, and that the indemnity covers such person's obligation also, does not make it a guaranty; and it is important that this should be stated, because that case is sometimes cited as going on still another ground, viz., that a promise to indemnify one for becoming a surety is not within the Statute of Frauds. Now while the rule upholding the validity of an oral promise to a debtor to pay his debt is almost unquestionable; the other doctrine, holding valid an oral promise to indemnify one for becoming surety is probably, as will be seen hereafter, not good law. The distinction between these principles is best shown by a case in 13 Vesey, in which the facts were as follows: One Crosbie, ancestor of the plaintiff, negotiated for the purchase of a house from B., stating his intention to give it to Mrs. Carmichael, one of the defendants; at Crosbie's request, and upon his promise to pay the price, Mrs. Carmichael gave a written agreement to take the property, and pay unpaid instalments of the price. Part of the price was paid at the time by Crosbie, who, after writing to Mrs. Carmichael to inquire when certain other instalments were due, paid them, but died before paying all. Mrs. Carmichael took possession with approval of Crosbie, who gave directions at different times about the repairing of the house. The Statute was held not to apply to her claim to have the whole price paid by Crosbie's estate, since she had assumed liabilities upon Crosbie's promise to indemnify her.(w)

(w) *Crosbie v. M'Doual*, 13 Ves. 159. Here it will be seen that Mrs. Carmichael had a direct promise of indemnity from Crosbie that certain payments to be incurred by the former should be repaid by the latter; the indemnity, it will be noticed, was not against a liability to be assumed as surety by Crosbie, but merely that he would reimburse Mrs. Carmichael as to certain obligations to be entered into by her. The word "indemnity" is not the proper one to be used in any case except that in which the person to whom the in-

demnity is given becomes surety for some third person. The reason why in this latter case the Statute of Frauds applies, is that such third person should ultimately exonerate the surety; and, therefore, the indemnitor's promise is in effect that if the third person does not exonerate the surety, he, the indemnitor, will, which engagement is of course a guaranty. A. says to B., become surety for C. to D.; C. should hold B. harmless; and if he does not, A. promises to do so. In the case of *Crosbie v. M'Doual*, cited above,

§ 77. The following are some examples of the rule now under consideration: thus Root, the defendant, on condition that Colt, the plaintiff, should deposit with a certain third party a note which he held against a corporation of which Root was a member, until Root should take up a note given by Colt to one J., and with the proceeds pay the note given by H. to Colt, promised to save Colt harmless on the note to J. The note to J. was, however, sued on by J., Root not having taken it up, and execution was issued against Colt whereby the latter was subjected to costs and other damages: Parker, C. J., said the promise was that of a debtor giving money to another to pay his debt, and that other failing to do so, and held that the Statute of Frauds

Examples
of the promise to the debtor.

there was no third person bound to exonerate the plaintiff; and the promise was to the debtor; in the case of an indemnity to one for becoming surety, the promise is made to the one who in the end is the creditor; that is to say, C. becoming bound to save B. harmless, A. promises B., who ultimately will be the creditor to whom C. is indebted, that if C. does not pay he, A., will. *Thomas v. Cook* would be this last case, but that there the promise was by A., that if B. would with him, A., and with C., become jointly answerable for a debt due by A. and C. to D., A. would save him harmless; this was a promise by A. to indemnify another for paying his, A.'s, debt, an engagement, as will be seen hereafter, to which the Statute of Frauds does not apply. In a case in Kentucky, closely resembling *Thomas v. Cook*, the Statute of Frauds was held not to apply, on both the grounds, viz., that it was a promise to answer for the promisor's own debt, and because an oral promise to indemnify one for becoming surety is valid. *Lucas v. Chamberlain*, 8 B. Mon. 276 (the present principle does not, however,

seem to apply); see, also, *Westfall v. Parsons*, 16 Barb. 684; where a debtor, unable to pay his note on which the defendant was payee and first endorser, and the plaintiff was second endorser, assigned his property to them, and they agreed to take up the note, and look for reimbursement to the assigned property, it was held that the defendant, though formerly, as first endorser, had been liable to ultimately reimburse the plaintiff, yet by the new agreement the original debtor became surety both to the plaintiff and defendant, and that the latter were liable, each for a half, to a holder of the note, and that the defendant's obligation to exonerate was discharged.

See, also, *Reader v. Kingham*, 13 C. B. N. S. 352, in which it was held that the Statute of Frauds did not apply to a promise made to the plaintiff by the defendant to answer for a debt which one H. A. owned one M. H. A. did not owe the plaintiff, nor did the defendant owe M.; the contract was exclusively, therefore, between the plaintiff and the defendant, and M. could not sue upon it.

did not apply.(x) The guaranty clause cannot be set up when the plaintiff sued on a promise to help him as to certain land which under the promise he was induced to buy: had the suit been by the vendor, the rule might have been otherwise.(y) Where A. bought real estate and had the agreement made out in his nephew's name, which he got his nephew to sign, and paid part of the purchase-money and died, it was held that the remainder of the purchase-money was to be paid by his estate, and the Statute of Frauds does not apply, on the ground that to involve the nephew in the liability of the transaction and then to leave him in the lurch would be a fraud.(z) In the leading case in New York it was decided that a promise to hold one indemnified against a subscription which he had given to a church is not within the Statute of Frauds, because the promissor is not liable to the church.(a) A promise by A. to B. to build a fence, which B. (*semble*) is under an obligation to A. and to the whole world to build, is not a guaranty.(b) Where the plaintiff, at the defendant's request, paid a debt which the latter owed to a third party, it was held that it was immaterial that the defendant was not perhaps indebted to such third party, and the court said that "in the case at the bar the defendant made no promise to pay the debt to the persons to whom it was due, but he made a new, distinct, and independent agreement with the plaintiff that if he would advance money for a certain specific object he would repay him that sum. This is clearly an original and not a collateral promise. It is wholly immaterial to inquire whether the plaintiff paid at his request. It is sufficient that it appears that the plaintiff has expended his money at the instance of the defendant and on his promise to repay it."(c) A promise of indemnity made by an attorney, on

(x) *Colt v. Root*, 17 Mass. 235.

(y) *Hill v. Smith*, 12 Rich. 701; see *supra*, *Crosbie v. McDoual*.

(z) *Skidmore v. Bradford*, L. R. 8 Eq. 184.

(a) *Cankey v. Hopkins*, 17 Johns. 113.

(b) *Talmadge v. Rensselaer R. R.*, 13 Barb. 498.

(c) *Perkins v. Littlefield*, 5 Allen, 370. Where in an action of trover for certain furniture the facts were shown to be as follows: that B. being indebted to Tibbetts, the defendant proposed to hand him over the furniture, which he declined to take; the plaintiff, Flanders, agreed to guarantee the note, and upon payment of the note

behalf of himself and his client, to a deputy sheriff for making a levy and execution is not within the Statute of Frauds.^(c) Where B.'s land was sold at sheriff's sale to C., and C.'s interest by other sales became vested in the defendant: B. seeking to redeem it, the defendant induced C. to defend the title and promised him to pay a debt he, C., owed the plaintiff; C. successfully defended the title: the Statute of Frauds did not apply.^(d) A promise to accept a bill on condition that the promisee will buy it is not within the Statute of Frauds.^(e)

§ 78. When the promissor owes the promisee money, and agrees with him to pay it by guaranteeing the latter's debt to another, the principle of *Eastwood v. Kenyon* applies all the more strongly.^(f) So, where the promise is not only made to the debtor, but in consideration of funds received by the promissor, the oral guaranty is on both grounds valid.^(g)

Promise to debtor, the guarantor having funds, or being indebted to the promisee.

§ 79. There are a few cases in which the principle now under consideration seems to have been overlooked and the Statute of Frauds held to apply. Thus, where the defendant, who held funds of a partnership, promised one of the partners to pay a certain debt of the latter to the plaintiff, and afterwards, by direction of a majority of the other partners, he pays it to one of their number, it was held that the latter payment was proper, the

"Promise to debtor" rule denied.

the furniture was to be his; the plaintiff did pay the note and demanded the furniture of the defendant, into whose possession it had come: it was held that the promise came under the rule of *Eastwood v. Kenyon*; *Tibbetts v. Flanders*, 18 N. H. 289; the principle of voluntary performance also applies in this case. See chap. on that subject.

(c) *Heidenheimer v. Johnston*, 17 Alb. L. J. 114 (Ct. App. Tex.); see § 100.

(d) *Whitesell v. Heiney*, 58 Ind. 112.

(e) *Townsley v. Sumrall*, 2 Peters (S. C.), 182.

(f) *Holt v. Dollarhide*, 61 Mo. 433; *Gleason v. Briggs*, 28 Vt. 139; *Goodwin v. Bowden*, 54 Me. 425; *Shaver v. Adams*, 10 Ired. 14; *Wilson v. Bevans*, 58 Ill. 234; *Eddy v. Roberts*, 17 Ill. 505; *Connor v. Williams*, 2 Roberts. 49; *Gold v. Phillips*, 10 Johns. 414; *Amenn v. Crosby*, 19 Law Reporter (Lowell), S. C. N. Y., 447; *Pike v. Brown*, 7 Cushing, 136; *Alger v. Scoville*, 1 Gray, 391; *Ruhling v. Hackett*, 1 Nev. 369.

(g) *Fisher v. Wilmoth*, 68 Ind. 450; *Todd v. Tobey*, 29 Me. 222.

first promise being invalid under the Statute of Frauds.^(h) So it has been said that a request to one liable on a note to defend a suit thereon is not within the Statute; the plaintiff, but for the alleged promise of the defendant, would have paid and saved costs; but this statement was dictum, as the court held that there was at any rate no contract.⁽ⁱ⁾ And in a Michigan case an oral promise by a railway to its contractor to pay his obligations, one of which was with the plaintiff, was held to be invalid under the Statute of Frauds.^(j)

§ 80. The most important question which comes up under the rule of *Eastwood v. Kenyon*, is whether the creditor can sue on the promise made to the debtor to answer for his debt, and there is certainly great conflict of authority on the point. On principle it would seem an evasion of the Statute of Frauds to make the validity of an oral guaranty depend upon the mere fact of the promise being given to the debtor on the one hand, or the creditor on the other. And while it may be true that as between the debtor and the guarantor the contract is not collateral, and the benefit thereby accruing to the creditor an accident, it ceases to be a private matter between these parties if the creditor can intervene and bring suit on the guaranty. On authority the law is probably in favor of the view that the creditor cannot sue unless, at least, the guarantor has been put in funds with which to meet the guaranty.^(k) In a case in Kentucky it was said "that although the general rule, as stated by Mr. Chitty in his treatise on Pleading, seems to import that a verbal promise to one to pay to another, may, under all circumstances, be enforced by an action in the name of the payee, whenever, as between the contracting parties, there is a legal obligation; yet we think that both authority and principle require that the plaintiff should not be a stranger

(h) *Steele v. First Nat. Bank*, 60 Ill. 26.

(i) *Wells v. Mann*, 52 Barb. 265.

(j) *Bottomley v. Port Huron, etc. R. Co.*, 44 Mich. 542; see *Ludlow v. Hatch*, 75 Ill. 11; see, also, *Kauffman v. Harstock*, 31 Ia. 473.

(k) The common law rule forbidding suit by a stranger to the promise prevented this point from arising in England. As to how far the beneficiary, not a party to the promise, can sue, see *Seaman v. Whitney*, 24 Wend. 260; see 18 Fed. Rep. 523, note by Dr. Wharton.

to the consideration.”(l) Even in New York, where the authorities go very far in supporting the creditor’s right to sue, it was held in an early case that a promise to hold one indemnified against a subscription he had given to a church was not within the Statute of Frauds, on the ground that the promisor was in no way liable to the church (see § 77).(m)

§ 81. While, as will be seen in a moment, the law generally is that a promise made to a debtor and engaging, in consideration of funds received, to pay the promisee’s debt, may be sued on by the creditor: yet even this modification of the strict rule is not universally accepted.(n) In a case in Connecticut the decision was based on the common law rule that a stranger to the consideration cannot sue: and this though the promisor had received firm assets and had agreed to pay the firm debts, a case closely approaching the category of promises by an assignee, generally to take assets and pay creditors.(o) And even in New York a

Cases holding that a creditor cannot sue even when the guarantor has funds, and this applied where a promise was made to the debtor.

(l) *Clark v. McFarland*, 5 Dana, 46; citing 1 Comyn on Contracts, 26; Dutton and Wife v. Poole, 2 Levinz, 210; 1 Ventris, 318, argued and same, p. 332, reconsidered and decided; 1 Strange, 592; 1 Bosanquet & Puller, 101 n. (c); *Pigott v. Thompson*, 3 ib. 149, and notes, and *Schemerhorn v. Vanderheyden*, 1 Johnson’s Rep. 140. See *North v. Robinson*, 1 Duv. 71; see, also, *People’s Bank v. Adams*, 43 Vt. 198; *Lang v. Henry*, 54 N. H. 59; see *Throop on Verbal Agreements*.

(m) *Conkey v. Hopkins*, 17 Johns. 113, and a distinction was drawn in another decision, which held that a promise given to a debtor though not within the Statute of Frauds cannot be sued on by the debtor’s surety. *Lawrence v. Fox*, 20 N. Y. 268, was distinguished as a case where the plaintiff was the creditor of the promisee; here the plaintiff had no claim against the promisee while the debt

was unpaid, and had only a general interest in the fulfilment of the promise. *Hoffman v. Schwaebe*, 33 Barb. 195; see *Roe v. Barker*, 82 N. Y. 435.

(n) *Shoemaker v. King*, 40 Pa. St. 109, citing cases and reversing *King v. Shoemaker*, 1 Pears. 212, also citing cases. *Stone v. Justice*, 9 Phil. 22, holding with *Shoemaker v. King*, that the original debtor must be discharged of liability, and saying that the difference between an assignee for creditors and such a promisor, is that the one incurs no obligation beyond the fund, and cannot return the surplus; whereas the latter must pay even if he loses his fund and can keep any surplus. In *Styvon v. Bell*, 8 Jones, 225, it was said that there must be a novation. As to Funds, see *supra*, § 42.

(o) *Clapp v. Lawton*, 31 Conn. 100; see *Stone v. Justice*, just cited; see, also, *Pratt v. Bates*, 40 Mich. 38.

distinction was made, and it was said in a case where the promissor had funds that the original creditor may sue if he has been informed of and assented to the arrangement.^(p) In a Michigan case it was said that the debtor might assign his claim upon the defendant to the plaintiff and thus give him the right to sue.^(q) In an early Pennsylvania case it was said that in case of funds a promise to pay as far as the funds would go can be sued on by the creditor.^(r) It has further been suggested that even in the case of funds the promise must be shown to have been one to pay from the funds.^(s) In another instance though the promise was by the vendee of a vendee of land to pay part of the price due by the promisee, the original vendee to the original vendor, the action was brought by the original vendee to the use of the original vendor, and recovery was had; it was evidently thought by counsel safer to bring suit in this way.^(t) Where, by writing, the defendant assumed to pay the debts of a partnership, parol evidence is admissible to show that the plaintiff's claim is one of these debts.^(u) In Pennsylvania the utmost extent of the creditor's right to sue would seem to be where the promissor has promised to pay from the fund, and where there is property in the fund to meet the plaintiff's claim. Whether having gone thus far the courts of that state have not in going no further taken an inconsistent position may be open to question, and it is not easy to see why one creditor who has received a promise from a guarantor in possession of funds should recover beyond the fund, and another creditor should be confined to the fund because in the latter case the promise has been made to the debtor. The Statute of Frauds does not apply in a case of funds, and the objection of want of privity is no greater when

(p) *State Bank v. Mettler*, 2 Bosw. 396; see *Fleming v. Easter*, 60 Ind. 402, where the plaintiff knew of and assented to the arrangement. See, also, *Schindler v. Ewell*, 45 How. Pr. 34.

(q) *Pratt v. Bates*, 40 Mich. 38; but as a general rule the creditor cannot sue; *Brown v. Hazen*, 11 id. 221.

(r) *Beers v. Robinson*, 9 Pa. St. 229.

(s) *Townsend v. Long*, 77 Pa. St. 146, distinguishing on this ground *Shoemaker v. King* and *Maule v. Bucknell*.

(t) *Taylor v. Preston*, 79 Pa. St. 441; see *Brown v. Brown*, 47 Mo. 131.

(u) *Goldbeck v. Eisele*, 8 W. N. Cas. 512 (S. C. Pa.).

recovery is sought beyond the fund, than when the claim does not extend beyond the latter.

§ 82. In spite of the cases just cited, which each to a different degree denies or limits the principle, yet the general rule is well established that where the promisor has funds he is in the position of a quasi-trustee or agent, and is bound to all who may be concerned.^(v) This distinction was sharply made by Lord Hardwicke in a case where there had been a promise to the widow of an intestate, that if she would permit the promisor to be administrator with her he would make up any deficiency of assets, and his lordship said that the creditor could not sue at law, as the promise was made to the widow, but can sue in chancery as the widow is trustee for creditors.^(w) The cases in the note below are all instances of a promise made by one holding funds.^(x) The commoner instance of the creditor's right to sue being sustained is where the guarantor has bought property of the debtor, and in payment of the price has engaged to assume the debt; this obligation, as will be seen later, is not within the Statute of Frauds, being a promise to pay the promisor's own debt, the recipient of the payment being the promisor's creditor instead of the promisor himself; a preponderance of very respectable authority authorizes the creditor to sue directly.^(y) And in one case,

The rule that the creditor can sue under these circumstances.

- (v) See *Townsend v. Long*, 77 Pa. St. 146; *Ill.* 505; *Wilson v. Bevans*, 58 *Ill.* 234; *Mathers v. Carter*, 7 *Bradw.* 226; *Ruhling v. Hackett*, 1 *Nev.* 369; *Rhodes v. Matthews*, 67 *Ind.* 131; *Woodward v. Wilcox*, 27 *id.* 214; *Haggerty v. Johnson*, 48 *id.* 43; *Garney v. Rogers*, 47 *N. Y.* 241 (the promise was the formal assumption of a mortgage); *Shaver v. Adams*, 10 *Ired.* 14; *Gleason v. Briggs*, 28 *Vt.* 139; *Hoile v. Bailey*, 17 *N. W. Rep.* 322, *S. C. Wis.*; *Foster v. Atwater*, 42 *Conn.* 250; *Flanagan v. Hutchinson*, 47 *Mo.* 238; *Beardslee v. Morgner*, 4 *Mo. App.* 142; *Cushman v. Garrison*, 2 *Cincin.* 146; see *Stewart v. Campbell*, 58 *Me.* 441; *Todd v. Tobey*, 29 *Me.* 222; see *Maxwell v. Haynes*, 41 *Me.* 559 (*dubitatum*).
- (w) *Earle v. Crane*, 6 *Duer.* 569; *Kirtland v. Hoole*, 8 *N. Y. W. Dig.* 275 (*N. Y. S. C.*); *Eddy v. Roberts*, 17

even in Pennsylvania, the recovery under these circumstances has been allowed. (z) Where the promise is a general one to pay all of the seller's debts or an entire class, the promissor is in a position analogous to that of an assignee for the benefit of creditors and as quasi-trustee, for the latter he is in privity with them. (a) At this point it may be well to note that while the right of the creditor to sue has in New York been very broadly conceded, there is authority for confining this right to the case of promise made in consideration of funds received by the promissor. Thus it has been said that "an examination of the conflicting cases in which suits have been brought by a person not a party to the contract, but for whose benefit the contract was made, will show that the question whether the defendant had received money or property as a consideration for the promise has in general been regarded as the controlling circumstance." (b)

§ 83. There remain now to be considered those cases, and

Creditor can sue, it has been held, though there are	they are not a few, in which the right of the creditor to recover on an oral promise of guaranty made to his debtor is laid down without qualification. Among others are those in the note below. (c) And
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(z) *Taylor v. Preston*, 79 Pa. St. 441.

(a) *Alcalda v. Morales*, 3 Nev. 137; *Bishop v. Stewart*, 13 Nev. 35; *Rhodes v. Matthews*, 67 Ind. 131; *Haggerty v. Johnson*, 48 id. 43; *Fisher v. Wilmoth*, 68 id. 450; *Fleming v. Easter*, 60 id. 402; *Burkham v. Mastin*, 54 Ala. 125.

(b) *Blunt v. Boyd*, 3 Barb. 212, adding that these cases are collected and compared in *Barker v. Bucklin*; in *Farley v. Cleveland*, 4 Cowen's R. 434; and see *Mallory v. Gillett*, 21 N. Y. 413, putting the leading case of *Lawrence v. Fox*, 20 N. Y. 268, on this ground.

(c) *Hitchcock v. Lukens*, 8 Porter, 338; *Huckabee v. May*, 14 Ala. 265; *Mathers v. Carter*, 7 Bradw. 226; *Brown v. Strait*, 19 Ill. 89; *Day v. Patterson*, 18 Ind. 117; *Haggerty v. Johnson*, 48

Ind. 43, citing cases, and defining *Shoemaker v. King*, 40 Pa. St. 109; *Whitesell v. Heiney*, 58 Ind. 112; *Fisher v. Wilmoth*, 68 Ind. 450; see *Farlow v. Kemp*, 7 Blackf. 544; *Johnson v. Knapp*, 36 Iowa, 617; *Robbins v. Ayres*, 10 Mo. 542; *Brown v. Brown*, 47 Mo. 131, citing cases; *Delaware Canal Co. v. Westchester Bank*, 4 Den. 97; *Seaman v. Hasbrouck*, 35 Barb. 153 (dictum); see *Hale v. Boardman*, 27 Barb. 84; *Mersereau v. Lewis*, 25 Wend. 247; *Barker v. Bradley*, 42 N. Y. 319; *Amenn v. Crosby*, 19 Law Rep. (Lowell) (S. C. N. Y.) 447; *Cushman v. Garrison*, 2 Cincin. 147; *Urquhart v. Brayton*, 12 R. I. 170, citing cases; see *Farmers' Bank v. Brown*, 1 Harring. 330; see *Hall v. Marston*, 17 Mass. 578; see *Ellis v. Clark*, 110 id. 391.

it has been thought that the weight of American authority is this way.^(d) And it was said in a Missouri decision "that one for whose benefit a promise has been made for a good and sufficient consideration may sue upon it, though not privy to the contract in which the promise was made, is perfectly settled in this state; and when one undertakes to pay the debt of another, and by the same act pays his own debt, which was the motive of the promise, the undertaking is not within the Statute of Frauds, and need not be in writing."^(e) So it has been said that, if the plaintiff is the party in interest, it is immaterial to whom the promise was made.^(f) The following statement of the law as it is in New York is not without interest, as showing how difficult it has been to justify the creditor's right to sue; the case in question, like *Lawrence v. Fox*, which it followed, was one where the promissor had funds, and the court said: "It may be considered as finally settled in this state by the court of last resort, in the case of *Lawrence v. Fox* (20 N. Y. Rep. 268), that whoever, in consideration of a benefit to himself or prejudice to another, promises to pay the debt of a third party, is liable directly to the creditor to whom such debt is due, even when the consideration proceeds from and the promise is made to the debtor alone. That decision bears strongly on the question whether such a promise be within the Statute of Frauds, for if it be in every aspect legally equivalent to a promise directly to the creditor, it is, in fact, an undertaking to answer for the debt of another, although he is still to remain liable. Had it been left simply as an express promise to the debtor to relieve him of a burden or indemnify him against a liability, which is not within the Statute,^(g) the debtor, if he were afterwards compelled to pay the debt, could recover the same amount as the measure of his damages in an action brought by him against such promissor. It seems to be a little incongruous, if both actions

no funds,
if the pro-
mise has
been made
to the
debtor.

(d) *Alcalda v. Morales*, 3 Nev. 137.

(e) *Beardslee v. Morgner*, 4 Mo. App. 142, citing cases.

(f) *Hodson v. Carter*, 3 Chand. 234; 3 Pinn. 213.

(g) *Connor v. Williams*, 2 Roberts, 51, citing *Conkey v. Hopkins*, 17 Johns. 113.

were brought on the same promise, that creditor and debtor could sue separately, equally well, upon an undertaking created by the same words, but only in terms directed to one of them. This difficulty is sought to be got rid of in the opinion of two of the learned judges in the case first referred to, by supposing the promise to be to the debtor as the creditor's agent. That supposes an agency without the consent of the agent, and should exclude the debtor from any right of action. Though he had paid the consideration, the promise was made to him, and he was to receive the benefit of it, and it makes the promises purely collateral. The only reasonable ground of sustaining the liability of the promissor directly to the creditor seems to be that laid down by Chief Justice Shaw, in *Brewer v. Dyer* (7 Cush. 337), quoted with approbation in the leading opinion in the case first referred to (*Lawrence v. Fox*). By that the law is made to presume a general duty to pay the debt, growing out of the form of the promise. By that means a privity between the creditor and the promissor is created; warranting the implication of another promise in law directly from the latter to the former, and its acceptance by the former. Such reasoning, however artificial, is necessary to keep a promise to a debtor to pay his debt out of the reach of the Statute of Frauds, if it is to be construed as creating any promise on which an action can be maintained directly by the creditor.”(h) The rule has been applied to a promise by a bank, made to the drawer of a check on it, before the check was drawn, that it would pay the check to the plaintiff, knowing that the check was to be given for a debt due by the drawer to the plaintiff, and the plaintiff relied on the bank's promise.(i)

(h) *Id.*, citing *Berly v. Taylor*, 5 Hill, 577.

(i) *Harrison v. Simpson*, 17 Kan. 512.

CHAPTER V.

THE SUBJECT MATTER OF THE GUARANTY— AND MISCELLANEOUS POINTS.

III. THE SUBJECT MATTER OF THE GUARANTY—VIZ., THE OBLIGATION WHICH IS ANSWERED FOR.

- § 84. The Statute of Frauds does not apply where no credit is given to the person answered for.
- § 85. Reliance on both parties.
- § 86. Reliance on the guarantor solely.
- § 87. Where sole credit is given guarantor, the Statute does not apply, though all benefit of contract accrued to person answered for.
- § 88. Examples under the last rule.
- § 89. The question who was trusted is for the jury.
- § 90. The manner in which the debt is charged as determining the liability.
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- § 96. Modifications of the last rule.
- § 97. The "trilateral liability" theory of *D'Wolf v. Rabaud*.
- § 98. *D'Wolf v. Rabaud* doubted.
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- § 100. Where no liability in third person, Statute does not apply.
- § 101. Where the person answered for is *non sui juris*.
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- § 113. Purchase theory.
- § 114. Promise to assignee of the debt.
- § 115. The guaranty really the payment of price of property bought by guarantor.
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- § 117. What is the promissor's own debt.
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- § 119. Official connection between the guarantor and the person answered for.
- § 120. Cases of application of the Statute, even where guarantor was

- officially connected with person answered for.
- § 121. Partnership.
- § 122. Husband and wife.
- § 123. A promise by a guarantor already liable.
- § 124. Indemnity for becoming a guarantor: see § 144.
- § 125. Where guarantor and person answered for are parties to same commercial paper, and where guarantor has been discharged from liability on the paper.
- § 126. Joint contractors.
- § 127. Guaranty of a debt assigned.
- § 128. The rule disregarded.
- § 129. Guaranty of debt resting on guarantor's property.
- § 130. Cases doubting the rule.
- § 131. Surrender of a lien.
- § 132. Promise to pay debt resting on promissor's property and guaranty in consideration of surrender of lien treated together.
- § 133. Lien must enure to promissor.
- § 134. Cases *contra*.
- § 135. Relinquishment of the opportunity for a lien.
- § 136. The Statute of Frauds sometimes applied in the instances under the last rule.
- § 137. Promise to pay a debt resting on the promissor's land.
- § 138. Assumption of a mortgage.
- § 139. Assumption of mortgage provided for in a deed poll, etc. etc.
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- § 141. Doubtful application of the principle.
- § 142. The rule doubted.
- § 143. Promise by debtor to pay a debt resting on his personal property.
- § 144. Indemnity to one for becoming guarantor.
- § 145. Indemnities held valid.
- § 146. Cases supporting an oral indemnity distinguished.
- § 147. Bail generally; criminal bail.
- § 148. The meaning of the word "indemnify."
- § 149. What is debt, default, or miscarriage.
- § 150. Miscellaneous points.
- § 151. Pleading and practice.

§ 84. WHERE no credit is given to the person answered for, the Statute of Frauds does not apply; (a) and where the third

- (a) *Mountstephen v. Lakeman*, L. R. 7 H. L. 24; *Grassett v. Hutchinson*, 10 U. C. C. P. 269; *Rhodes v. Leeds*, 3 St. & P. 212; *Oliver v. Hire*, 14 Ala. 592; *Sanford v. Howard*, 29 Alabama, 691; *Boykin v. Dohlond*, 37 Ala. 581; *Ware v. Morgan*, 67 Ala. 467; *Kurtz v. Adams*, 7 Eng. (Ark.) 174; *McLendon v. Frost*, 57 Ga. 450; *McCoy v. Williams*, 6 Ill. 589; *Williams v. Corbet*, 28 Ill. 263; *Hughes v. Atkins*, 41 Ill. 214; *Cox v. Strasser*, 62 Ill. 384; *Schoenfeld v. Brown*, 78 Ill. 489; *Nelson v. Hardy*, 7 Ind. 367; *Wills v. Ross*, 77 Ind. 1; *Rhodes v. McKean*, 55 Ia. 548; *Langdon v. Richardson*, 58 Ia. 610; *Waggener v. Bells*, 4 Mon. 9; *Porter v. Langhorn*, 2 Bibb, 63; *Graves v. Scott*, 23 La., Ann. 692; *Homans v. Lombard*, 8 Shep. 308; *Sanborn v. Merrill*, 41 Me. 468; *Ellicott v. Peterson*, 4 Md. 476; *Cropper v. Pitman*, 13 Md. 195; *Myer v. Grafflin*, 31 Md. 354; see *Loomis v. Newhall*, 15 Pick. 166 (passing on *Read v. Nash* and *Williams v. Leper*); *Chapin v. Lapham*, 20 Pick. 467; *Perkins v. Hinsdale*, 97 Mass. 159; *Furbish v. Goodnow*, 98 Mass. 296; *Dean v. Tallman*, 105 Mass. 443; *Wallace v. Wortham*, 25 Miss. 119; see *Rose v. O'Linn*, 10 Neb. 364; *Proprietors v. Abbott*, 14

party gave no promise.(b) This principle was laid down not long after the passage of the Statute of Frauds. Chief Justice Holt said: "If A. promise B., being a surgeon, that, if B. cure D. of a wound, he will see him paid, this is only a promise to pay if D. does not, and, therefore, it ought to be in writing by the Statute of Frauds. But if A. promise in such case that he will be B.'s paymaster whatever he shall deserve, it is immediately the debt of A., and he is liable without writing." (c) And in the leading case of *Birkmyr v. Darnell*, it was said that where the "whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking; both parties were liable in the principal case, and the Statute of Frauds applied. If two come to a shop and one buys, and the other, to gain him credit, promises the seller *if he does not pay you I will*, this is a collateral undertaking, and void, without writing, by the Statute of Frauds. But if he says *let him have the goods, I will be your paymaster*, or *I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." (d) Where one Simpson sued Penton for money paid to his use,

III. THE SUBJECT MATTER. The Statute of Frauds does not apply where no credit is given to the person answered for.

N. H. 157; *Hetfield v. Dow*, 3 Dutch. 455-6; *Price v. Combs*, 7 Halst. 189; *Chase v. Day*, 17 Johns. 114; *Briggs v. Evans*, 1 E. D. Smith, 195; *Quintard v. De Wolf*, 34 Barb. 97; *Graham v. O'Neil*, 2 Hall, 474; *Allen v. Scarff*, 1 Hilt. 213 (citing cases); *Brady v. Sackrider*, 1 Sand. 515; *Lathrop v. Hopkins*, 17 N. Y. W. Dig. 191 (S. C. N. Y.); *Hassinger v. Hardy*, 19 Pitts. L. J. 65; *Patton v. Hassinger*, 69 Pa. St. 314; *Smith v. Montgomery*, 3 Tex. 204; *Clark v. Waterman*, 7 Vt. 77; *Arbuckle v. Hawks*, 20 Vt. 538; *Hodges v. Hall*, 29 Vt. 209; *Blodgett v. Lowell*, 33 Vt. 176; *Bagley v. Moulton*, 42 Vt. 188; *Waggoner v. Gray*, 2 Hen. & Mun. 603; *Hall v. Wood*, 4 Chand. (Wis.) 38; *Vogel v. Melms*, 31 Wis. 310; *West v. O'Hara*, 55 Wis. 647. As to what amount of credit must be given the guarantor to take the case out of the Statute of Frauds, see *Rains v. Storry*, 3 C. & P. 130; *Smith v. Rudhall*, 3 F. & F. 143.

(b) *Whitman v. Bryant*, 49 Vt. 514; and see cases just cited.

(c) *Watkins v. Perkins*, 1 Ld. Ray. 224.

(d) *Salk.*, 27 (a); S. C., S. N., *Bour Kamire v. Darnell*, Mod. Cas. 248; 1 Sm. L. C. (Am. ed.) p. *371, note; see the note in the latter book denying the value of the distinctive phrases used in the text.

Penton's defence was that the payment was voluntary. Simpson had introduced Penton to one O., and asked the latter to let Penton have some goods, and that he, Simpson, would be answerable. O. asked Simpson how long credit he wanted, and the latter replied six months. Penton seems to have said nothing, but indicated where the goods were to be sent. O. charged the goods in his books as follows: "Mr. Penton per Mr. Simpson." This was held to be sufficient evidence of an original promise so as to prevent his subsequent payment to O. from being a mere voluntary one.^(e) In a New York case it was said that it is not necessary that a party promising absolutely to pay for goods to be sold, or services rendered to another, should be under an obligation to pay at the time he makes such promise. The question is whether the goods are sold or services rendered on the sole credit of the party so promising; if they are, the promise is not to pay the debt of another, but an original undertaking, and, therefore, not within the Statute of Frauds requiring it to be evidenced by a writing.^(f) Where the court told the jury that, if goods were furnished McN. (the party answered for) on his credit, the defendant was not liable; but if on the defendant's credit only, then the defendant is liable; but if on the credit of both, then the defendant is not liable: this was held to be correct.^(g) Where *semble* there was no credit given to the person answered for, the court said, in a late North Carolina case, that "the contract between P. & Co. (to whose claim the plaintiff succeeds as sole assignee of the firm) and the defendant was the *sole contract* in the case, and is not collateral to any entered into by K., the goods were supplied to him

(e) *Simpson v. Penton*, 2 Cr. & M. 433; 4 Tyr. 317. Where the plaintiff had been asked by S. for a loan of money and had refused it, and where the defendant soon after, not in the presence of S., said to the plaintiff, "Well, pay it for me, and I will repay you," and the plaintiff paid the sheriff's officer, it being the object of the proposed loan to S. to get rid of an execution, it was held that the loan

was to the defendant, not to S.; that S. was not liable for its repayment; and that it was an original promise on the defendant's part; *Pearce v. Blagrove*, 30 Eng. L. & Eq. 511; 3 Common Law, 335.

(f) *Hanford v. Higgins*, 1 Bosw. 448.

(g) *Brown v. Bradshaw*, 1 Duer, 199.

under an absolute and unconditional promise of defendant, not to see them paid, or to guarantee the payment by K., but to pay for them himself.^(h) To validate an oral guaranty the jury must find, it is said, not merely that the goods were furnished at the request of the defendant, but also on his sole credit.⁽ⁱ⁾ Where there was evidence of credit given solely to the defendant, and on which a verdict for the plaintiff might have been sustained, but there was also evidence the other way, a refusal to charge that, if the defendant was not solely trusted, the Statute of Frauds applied was held in a New York case to have been error.^(j)

§ 85. Where the action is brought against both the defendant and the person answered for, it would indicate that credit had been given to both.^(k) So where no claim is set up against the defendant until after the third party had failed to pay.^(l) Though if the defendant's promise was really not collateral, it makes no difference that the third person was first called on.^(m) "When an action is brought against one, charging him with the value of goods delivered to another, and on his promise to pay, and it is set up in defence that the promise was to pay the debt of another, and was not in writing, the decisive question is, to whom was the credit given. If the credit was given solely to the defendant—that is, if the goods were really sold to him, though delivered to another—the Statute is then out of the case. But if the whole credit was not given to the defendant, that is to say, if any credit at all was given to the party receiving the goods, the promise of the defendant is collateral, and within the Statute. For, in that case, the plaintiff would have a remedy against the party receiving the goods. And all the cases show that it does not matter upon which of the two parties the plaintiff principally depends for payment, so long as the per-

Reliance
on both
parties.

(h) *Morrison v. Baker*, 81 No. Car. 80.

(i) *North. Cent. R. R. v. Prentiss*, 11 Md. 127; see *Mines v. Sculthorpe*, 2 Campb. 217.

(j) *Burgdorf v. Odell*, 17 N. Y. W. Dig. 542 (N. Y. S. C.).

(k) *McGaughey v. Latham*, 63 Ga. 68.

(l) *Bloom v. McGrath*, 53 Miss. 257.

(m) *Norris v. Graham*, 33 Md. 58.

son for whose use the goods are furnished is at all liable to him.”(n) That but for the guaranty the plaintiff would not have trusted the person answered for is, of course, no reason for making an exception to the Statute of Frauds.(o) This point was well brought out in a recent Massachusetts case, in which the court said: “The defendant requested the judge to instruct the jury that, if any credit was given to the firm, the promise of the defendant was collateral, and must be in writing to be binding. But this instruction the judge failed to give. The instruction given upon this point was, that ‘if the credit was given to Tully Brothers & Walker alone, the statute is a defence, but the plaintiffs say they would not agree to deliver unless the defendant promised to pay.’ But this does not cover the defendant’s request; for the plaintiffs may have refused to deliver without the defendant’s promise to pay, and at the same time have given credit to the firm, and looked to it for payment as well as to the defendant. The jury were not instructed that the defendant’s promise might be collateral in case any credit was given to the firm, although the plaintiffs also gave credit to the defendant.”(p) That the goods whose price is sued for were furnished a third party on the “credit and responsibility” of the defendant does not necessarily make the latter’s promise original, and instructions to that effect are improper.(q) Where there is no evidence of a joint-contract, and the third party is credited, a promise to pay if he does not, for goods delivered and charged him is a guaranty within the Statute of Frauds, and this though the plaintiff refused to deliver the goods till the defendant gave the guaranty.(r) But evidence that the promisee refused to deliver goods to a third party unless the promisor would become guarantor will support, it was said in a Pennsylvania case, a verdict holding the promise an original one, though there was only this direct evidence, and the circumstances

(n) *Boykin v. Dohlond*, 37 Ala. 583, citing cases.

(p) *Bugbee v. Kendrick*, 130 Mass. 438.

(o) *Wilson v. Roberts*, 5 Bosw. 107; *Bloom v. McGrath*, 53 Miss. 258; as to the Scotch rule, see *supra*, § 26.

(q) *Norris v. Graham*, 33 Md. 58.

(r) *Conolly v. Kettlewell*, 1 Gill, 263.

indicated a relation of mere suretyship.(s) An intention of the creditor to rely upon the guarantor will not, if the party answered for is already indebted to the creditor, take the case out of the Statute of Frauds, if the guarantor had done nothing to induce the creditor to rely solely upon him; the fact that the creditor relied solely on the guarantor's promise, and refrained from getting his pay from the person answered for, does not make the latter's promise original.(t) Where one C. bought horses from the plaintiff, and gave his note, but the horses were not delivered till Ide had guaranteed the debt, it was held to be a plain case of guaranty, though the horses were not to be delivered till the guaranty was procured, and of this the defendant was informed.(u) The following are examples of a reliance upon both parties: Thus where the defendant and S. came to the plaintiff's warehouse, and agreed on a parcel of goods for S.; the plaintiff said he did not know S., and asked if the defendant would answer for him; the defendant said he would guaranty the payment. S. came afterwards and ordered other goods, and the plaintiff sent to the defendant to know if he would engage for S. The defendant answered that the plaintiff might ship a certain amount of goods, and that the defendant would pay him, if S. did not. It was held that the Statute of Frauds applied.(v) Where the plaintiff delivered a horse to A. in the defendant's presence, who said to A., "any agreement you and Billingsley make about the horse I will make good," it was held to be a question of fact for the jury as to whom credit was given, and a finding for the defendant was not disturbed.(w) Where the defendant signed a note as president of a certain company, and the payees of the note gave credit to the company also, the Statute of Frauds applied.(x) Where the goods were sold

(s) *Weyand v. Crichfield*, 3 Grant, 113.

(t) *Tileston v. Nettleton*, 6 Pick. 509.

(u) *Smith v. Ide*, 3 Vt. 295.

(v) *Peckham v. Faria*, 3 Doug. 13, citing *Jones v. Cooper*; see *Cropper v. Pittman*, 13 Md. 195. In a Massachusetts case, where no question of the Statute arose, it was held that the

plaintiff having taken a note from the person answered for showed that the contract was collateral; *Babcock v. Bryant*, 12 Pick. 134.

(w) *Billingsley v. Dempewolf*, 11 Ind. 416.

(x) *Wyman v. Gray*, 7 Harr. & J. 415. Where the respondent was present as M.'s attorney when the application

to a third person, and the defendant agreed to be responsible for the price, the Statute of Frauds, as a general rule, applies.(y)

§ 86. The following are some examples in which no credit having been given to the third party, the Statute of Frauds was held not to apply. Thus where the defendant had sent for a farrier and said "I will see you paid:" where the plaintiff knew the owners of the horses and debited these owners, but where he did not know he debited the defendant: in the latter case the promise was original, but in the former collateral.(z) A son having no credit, obtained goods from the plaintiffs, asking them to charge them to the defendant, his father. The defendant upon being informed of this, said he would pay, and was held to be bound.(a)

was made, and to induce Allen to make the loan, said to him, in M.'s presence and at his request, that he would see him (Allen) all right, and would pay the money if M. did not repay it; that Allen thereupon advanced \$2000 to M. and took his note therefor; that when the note became due M. paid to Allen \$1000 thereon, but failed to pay the residue. Allen afterwards, on several occasions, requested the respondent to pay the sum remaining unpaid; and on the 5th of October, 1876, the respondent, in compliance with Allen's requests, paid to him the money, amounting to \$1100. The court said that no doubt can be entertained, upon these facts, that the respondent's promise to Allen was within the provisions of the Statute of Frauds, and created no obligation which Allen could have enforced; *Simpson v. Hall*, 47 Conn. 425.

(y) *Kinloch v. Brown*, 1 Richards. 225.

(z) *Oldham v. Allen*, cited in *Simpson v. Penton*, 2 Cr. & Mees. 433. See *Houlditch v. Milne*, 3 Esp. 87.

(a) *Booker v. Taly*, 2 Humphr. 309.

In a Texas case it was testified that Durland came to appellees' lumber yard, then in witness's charge, and ordered bills of lumber for the purpose of constructing the house of appellant; that witness refused to let Durland have the lumber, and afterwards met the appellant and told him that Durland wanted to purchase lumber, etc., from him to build his (appellant's) new house, but that he refused to let him have it unless he (appellant) would agree to pay for it. The appellant at first refused to pay for the lumber, saying that he had made a contract with Durland to build his house and furnish everything for \$1800 specie; but when witness told him that he would not let Durland have the lumber and material unless he agreed to pay for it, the appellant told him to furnish the lumber, etc., to Durland, and that he would pay for it; and with this understanding witness furnished the lumber, etc., to Durland to build appellant's house. Under the testimony the agreement of defendant Green was not collateral to that of Durland, the contractor, but an original one, and

A contractor bought goods of the plaintiff, who refused to trust him; the defendants, the owners, then gave a written guaranty: it was held that an action lay thereon as on an original and not a collateral promise.^(b) Where the plaintiff boarded the preacher of a Methodist society, relying upon the promise by the defendant to pay him, and he did not know that the latter was steward of the society, whose duty it was to provide for the preacher, the Statute of Frauds was held not to apply.^(c) After three visits by the plaintiff, a physician, to the defendant's son-in-law, the defendant said that he would be responsible, and as to visits thereafter made the Statute of Frauds did not apply.^(d) A promise to indemnify one for endorsing a promissory note is not within the Statute of Frauds if the promisee relied solely upon the indemnity and not at all upon any promise or liability of the maker of the note, who was in point of fact insolvent^(e). Where the credit is given

was not of that character required to be in writing by the Statute of Frauds; *Green v. Dallahan*, 54 Tex. 283.

(b) *Glidden v. Child*, 122 Mass. 437.

(c) *Bushee v. Allen*, 31 Vt. 634.

(d) *King v. Edmiston*, 88 Ill. 257. See *Clark v. Waterman*, 7 Vt. 77; *Buchanan v. Sterling*, 63 Ga. 227; *Rose v. O'Linn*, 10 Neb. 364. Where the defendant ordered goods for the funeral of his brother, and made all the arrangements, a nonsuit was taken off, though the widow was present and though the plaintiff had frequently been employed before by the widow's family, and never by the defendant's family, and though the defendant wrote the plaintiff a letter in which, denying his liability and asserting the widow's, went on to say that the bill should be paid, and that the family all felt that such a debt should not continue unpaid; *Schuyler v. Mershon*, 2 W. N. Cas. 703, C. P. No. 4, Phila. In a case not involving the Statute of Frauds there was a writing reciting that Colter, the plaintiff, is about to employ B. as his agent

to purchase, and that it will be necessary for the plaintiff to advance money for the purchases, and agreeing on the defendant's part to pay the plaintiff all the money he may advance to B., and that may be due to him, Colter, from B.; it was held to show an original and not a collateral agreement, so as to determine the proper form of action; *Dickinson v. Colter*, 45 Ind. 446.

(e) *Vogel v. Melms*, 31 Wis. 310. The defendant took a note from F. & Co. and had it drawn to the plaintiff's order; the plaintiff, however, refused to endorse, and would not do so till the defendant promised to indemnify him; the plaintiff did not look to F. & Co., as he considered them, so he told the defendant, not responsible people: it was held that the Statute of Frauds did not apply, as the plaintiff did not look to F. & Co., and as they did not request the plaintiff's endorsement, and received no benefit therefrom, F. & Co. were of course liable on the note to the plaintiff; *Reed v. Holcomb*, 31 Conn. 363.

exclusively to the guarantor the Statute of Frauds does not apply: one who received orders issued by a sub-contractor to his employes on the exclusive faith of an oral guaranty by the principal contractor that they would pay the orders, can recover(*f*). Where the defendant, who was interested in having a certain contract made by G. S. & Co. fulfilled, promised a bank to which G. S. & Co. were liable on an overdrawn account to pay the latter if the bank would honor certain checks to be drawn by G. S. & Co., the court rightly instructed the jury if they found that the promise was not collateral to G. S. & Co.'s liability, but was a distinct understanding, on the faith of which alone the checks were cashed, the Statute of Frauds did not apply(*g*). Where there was evidence of the insolvency of the person guaranteed and circumstances showed that no credit was given him, the promise on the defendant's part may be found to be original(*h*). An open letter of credit is so far an original undertaking as not to require preliminary steps to charge the person answered for(*i*). An acknowledgment by the defendant of the correctness of claim for certain goods delivered him and a promise to pay it, constitute a mere guaranty where the evidence showed that when the goods were sold no credit whatever was given him, but that the seller looked solely to a certain third party; and this though by an erroneous ruling a suit against the third party had failed(*j*).

§ 87. If the credit is given solely to the defendant, the fact

Where sole credit is given guarantor	that the goods were delivered, or the benefit generally of the transaction accrued, to the third party will not cause the Statute of Frauds to apply. <i>(k)</i> In
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(*f*) *West v. O'Hara*, 55 Wis. 647.

(*g*) *Lefevre v. Farmers', etc., Bank of Shippensburg*, 2 W. N. Cas. 174.

(*h*) *Locke v. Brown*, 14 Me. 111.

(*i*) *Duvall v. Trask*, 12 Mass. 156.

(*j*) *Hendricks v. Robinson*, 56 Miss. 697; 2 Memphis L. Jour. 199.

(*k*) *Faires v. Lodance*, 10 Ala. 52; *Oliver v. Hire*, 14 Ala. 592; *Boyd v. Dohlond*, 37 Ala. 582 (not deciding the question); *Davis v. Tift*, 11 Am. L. Rec. 701 (S. C. Ga.); *Geary*

v. O'Neil, 73 Ill. 595; *Johnson v. Hoover*, 72 Ind. 397; *Langdon v. Richardson*, 58 Iowa, 610; *Backus v. Clark*, 1 Kan. 308; *Leisman v. Otto*, 1 Bush, 225; *Sanborn v. Merrill*, 41 Me. 468; *Stone v. Walker*, 13 Gray, 615; *Lyon v. Chamberlain*, 8 American Law Rec. 331 (S. C. Mich.); *Watson v. Parker*, 1 Hun, 618; *Pierson v. Werhan*, 14 Hun, 626; *Flanders v. Crolus*, 1 Duer, 207; *Dyer v. Forest*, 2 Abb. Pr. 285.

an early case in England the court spoke of the purchase of goods by one man for another as being everyday's practice, and intimated that the Statute of Frauds did not apply.^(l) Chief Justice Holt, in another case, said: "If B. desire A. to deliver goods to C., and promise to see him paid, the assumpsit lies against B."^(m) It is not even material that the person answered for arranged to repay the defendant.⁽ⁿ⁾ The fact that one promissor is to receive the whole consideration will not make a joint-promise a guaranty, just as it would not make a several promise by A. to pay for goods delivered to B. a guaranty.^(o) It makes no difference under the Statute who is to reap the benefit of the transaction, and it has been held, that "the parol promise of the beneficiary to pay the debt of him who by his credit has procured the goods, is as invalid as a like promise by the surety where the primary obligation rests upon the beneficiary. The object and intent of the Statute is to deny the imposition of a liability, by parol, upon two persons to pay the debt of one. And it is wholly immaterial whether the person sought to be charged is he who got the benefit of the contract, or he who procured it to be made for the benefit of another."^(p)

the Statute does not apply, though all benefit of contract accrued to person answered for.

§ 88. The following are some examples of credit given to the defendant, and the benefit accruing to the person answered for, and yet the Statute of Frauds not applying: Thus, where F. applied to the plaintiff, a tailor, for clothes which the plaintiff, not trusting F., refused to sell him; but upon the defendant's agreeing to pay for them, he agreed to sell them to F. Evidence showed that plaintiff delivered clothes to F., but upon F.'s failure to pay took them back again; but redelivered them upon a second

Examples under the last rule.

(l) *Stevens v. Squire*, Comb. 362; S. C., S. N., *Stephens v. Squire*, 5 Mod. 205.

(m) *Austen v. Baker*, 12 Mod. 250.

(n) *Eddy v. Davidson*, 42 Vt. 60; see *Hacker v. Ferrill*, 3 Th. & Cooke, 780; see *Merriman v. Liggett*, 1 W. N. Cas. 379 (S. C. Pa.), as to arrange-

ments between the creditor and the person answered for not concerning the guarantor; see *Gibbs v. Blanchard*, 15 Mich. 299.

(o) *Gibbs v. Blanchard*, 15 Mich. 299.

(p) *Hendricks v. Robinson*, 56 Miss. 697.

promise by the defendant; the defendant acknowledged the promise, and asked for time. The Statute of Frauds was held not to apply, as no credit was given to F.(q) Where the defendant went with one C. to the plaintiff's store and asked them to sell him, C., any goods he wanted, and he, the defendant, would be responsible; the evidence showed that the goods were sent to C. by the defendant's own direction, and other circumstances not mentioned are said to indicate that the defendant only was trusted; the word "sell" the court had difficulty with, as that indicated that C. was to be liable; but the point was not considered as final.(r) Where Ha. buys goods, orders them charged to R. & Co., the defendants, and marked with their name; the defendants upon being informed said "it was all right for this time," and then the plaintiff shipped as marked. It was held, that it was for the jury to say whether the goods had been sold on the defendant's credit, and that if they had, the Statute of Frauds did not apply, as the contract would not then be a guaranty.(s) A promise to pay for work to be done for the benefit of one, not a party to the contract, is not a guaranty within the Statute of Frauds.(t) Where one M. bid for chattels sold by the plaintiff, but could not give security, and the defendant said he would take M.'s bid as his own,

(q) *Croft v. Smallwood*, 1 Esp. 121. Where the defendant wrote: "Let Mr. T. B. have what goods he wants, and charge yours, M. Hutchinson," shows an original engagement, and not a guaranty; and a count as for a guaranty will not be sustained; *Grassett v. Hutchinson*, 10 U. C. C. P. 269; see *Ford v. Rockwell*, 2 Col. Terr. 377.

(r) *Post v. Geoghegan*, 5 Daly, 217. Where one Porter telegraphed Dunning & Co., the plaintiffs, for goods, which not trusting Porter they did not send; the next day the plaintiffs received the following telegram: "Dunning & Co., I will be responsible for Porter's bill of goods ordered yesterday, A. Roberts." Whereupon the plaintiffs let Porter have the goods. It was found as a fact by the referee that this telegram was sent by

one Edwin S. Roberts, after a discussion of the subject between himself, A. Roberts, the defendant, and Porter; and that it was with A. Roberts's authority and knowledge. It was held to be a sufficient memorandum within the Statute of Frauds, as being sufficiently executed, and that it showed an adequate consideration; the court said that the facts showed that it was on the faith of this telegram that the goods were delivered to Porter; that the meaning of the telegram was that if the plaintiff would deliver the goods the defendant would pay for them; *Dunning v. Roberts*, 35 Barb. 468.

(s) *McCaffill v. Radcliff*, 3 Roberts. (N. Y.) 446.

(t) *Sinclair v. Bradley*, 52 Mo. 180.

and that if M. got the articles, he, the defendant, would see that the plaintiff got his pay; it was held that if no credit was given M., the oral guaranty was good, but *secus, secus.*(*u*) Where the evidence showed that the defendant procured the plaintiff to furnish goods to D., a stranger to the plaintiff, by guaranteeing the payment, there was enough proof to justify a finding for the plaintiff though the books of the latter showed the charges as against D.(*v*) Services performed upon the land of the mother of the party sought to be charged, but upon the latter's request and promise to pay for them, can be recovered for notwithstanding the Statute of Frauds.(*w*) In a New York case it was said that "while a person may become liable upon a parol promise for goods purchased which are delivered to and are intended for the use of another, in order to make him so the debt must be his only, he must be exclusively liable therefor. To determine the question as to whether the transaction is a sale to the promissor or a parol guaranty upon his part of payment by another, the language of the promise is to be construed in the light of the acts of the parties and the surrounding circumstances, and the question is one of facts."(*x*) Evidence that the defendant got the goods and sold them is pertinent on the issue as to whom the credit was given.(*y*) In a case in New

(*u*) *Pettit v. Braden*, 55 Ind. 204.

(*v*) *Barrett v. McHugh*, 128 Mass. 166, citing *Heywood v. Stiles*. In an Illinois case the court said "this was an action of assumpsit, brought by Liddell, against the Chicago and Wilmington Coal Company, on a contract to furnish boarding for certain workmen employed by the company in mining coal, the evidence shows the undertaking was not collateral, but primary. No contract was made with any one of the miners for board, but defendant undertook, in the first instance, to pay their board, at the rate of five dollars per week, the company having control of the fund out of which it was to be paid;" *Chicago, etc. Co. v. Liddell*, 69 Ill. 648.

(*w*) *Black v. White*, 13 Shand, 38.

Evidence that the promisee refused to deliver goods to a third party unless the promissor would become paymaster will support a verdict holding the promise an original one, though there was only this evidence to that effect, and the circumstances indicated a relation of mere suretyship; *Weyand v. Crichfield*, 3 Grant, 113.

(*x*) *Cowdin v. Gottgetreu*, 55 N. Y. 650.

(*y*) *Turton v. Burke*, 4 Wis. 121. In an Alabama case which did not raise any question of the Statute of Frauds, the defendant wrote: "Please let Mr. Orr, etc., have any little things he may stand in need of, and I shall be good for the same;" this was held an

York where the suit was for goods ordered by and for the benefit of one M. A. N., and the proof offered was that the defendant had arranged that these goods were to be charged to him (being a gift or loan by him to M. A. N.), it was held that the complaint must aver that M. A. N. was agent to receive them, and did receive them so as to bind defendant. This case was said to be within the mischief of the Statute of Frauds.^(z) A written direction to the plaintiff to let a third party have goods, and charge the same to the defendant, is evidence for the jury of an original promise on the defendant's part, and even if a guaranty is sufficiently evidenced under the Statute of Frauds, the question to whom the credit was given was properly left to the jury.^(a) Where there was conflicting evidence as to who was trusted, a refusal to charge that if the defendant was not solely looked to, the Statute applied was held in a New York case to be error; the defendant when he made the promise, said he would come and choose the goods; he did not do so, but the person for whom he said he was guarantor did come and choose the articles.^(b)

§ 89. The question as to who was trusted is always for the jury.^(c) Thus it has been said that, when there is any conflict of evidence upon the subject, the weight to be given to any particular circumstances should be left to the jury, who, in deciding the question to whom the credit was given, should take into consideration the extent of the undertaking, the expression used, the situa-

original promise and not collateral, and no notice of acceptance or demand of payment was necessary; Orr was a stranger to the plaintiff, but the goods were charged to him and he paid for part; *Scott v. Myatt*, 24 Ala. 493.

(z) *Smith v. Leland*, 2 Duer, 508.

(a) *Scudder v. Wade*, 1 South. 249.

(b) *Burgdorf v. Odell*, 17 N. Y. W. Dig. 542, S. C. N. Y.

(c) *Darnell v. Tratt*, 2 C. & P. 82; *Ruggles v. Gattton*, 50 Ill. 414; *Billingsley v. Dempewolf*, 11 Ind. 416; *Locke v. Brown*, 14 Me. 111; *Elder v. Warfield*, 7 Harr. & J. 396; Northern

Central R. R. v. Prentiss, 11 Md. 127; *Myer v. Grafflin*, 31 Md. 354; *Perkins v. Hinsdale*, 97 Mass. 159; *Dean v. Tallman*, 105 Mass. 444; see *Lee v. Wheeler*, 11 Gray, 236; *Holmes v. Knights*, 10 N. H. 176; *Scudder v. Wade*, 1 South. 249; *Quintard v. De Wolf*, 34 Barb. 97; *McCaffil v. Radcliff*, 2 Roberts. (N. Y.), 446; *Cowdin v. Gottgetren*, 55 N. Y. 650; *Estabrook v. Gebhart*, 32 Oh. St. 420; *Merriman v. Liggett*, 1 W. N. Cas. 379 (Pa.); *Schuyler v. Mershon*, 2 id. 703; *Antonio v. Clissey*, 3 Richards., 203; *Sinclair v. Richardson*, 12 Vt. 38.

tion of the parties, and all the circumstances of the case.(d) A court which thinks the verdict against the weight of the evidence in such a case may, of course, set the verdict aside, and in a clear case this has been done by a court of error.(e)

§ 90. The manner in which the creditor charges the debt is evidence as to whom he had trusted; the entries in his book of original entries are admissible for this purpose.(f) Said Chief Justice Holt: "If B. desire A. to deliver goods to C., and promise to see him paid, then assumpsit lies against B." Though, in that case, he said that, at Guildhall, he always required the tradesman to produce his books to see to whom credit was given.(g) In a New Jersey case the manner of charging the debt in the creditor's books is evidence of more or less weight.(h) It is strong, but not conclusive evidence.(i) That the goods were charged to the person answered for is, as far as that one fact goes, evidence, that the promise was a guaranty.(j) It is the construction which the plaintiff him-

The manner in which the debt is charged as determining the liability.

(d) *Boykin v. Dohlonde*, 37 Ala. 581, citing cases. Thus, in a Massachusetts case the court said: "The evidence was very strong that the contract of the defendants was a collateral undertaking, and so within the Statute of Frauds, and would have fully warranted such a finding by the jury. But the plaintiff, in one part of his testimony, expressly stated that the sole credit was given by him to the defendants, and none to Charles F. Hinsdale, and the letter written by one of the defendants to Mr. Beach, the attorney, has some semblance of an admission of an original and direct responsibility. Considering, therefore, that the evidence was chiefly oral, not absolutely distinct in its terms, or consistent in its different parts, and that its effect depends partly upon inferences to be drawn from it, we think, on the whole, that it should have been submitted to the jury, under proper instructions, to determine the

question what the contract was, as a question of fact, and that the court should so have tried it;" *Perkins v. Hinsdale*, 97 Mass. 159.

(e) *Brown v. Bradshaw*, 1 Duer, 199.

(f) *Downer v. Morrison*, 2 Gratt. 237; see *Payne v. Baldwin*, 14 Barb. 571; *Lee v. Wheeler*, 11 Gray, 231; *Langdon v. Richardson*, 58 Ia. 610; *Green v. Dallahan*, 54 Tex. 283.

(g) *Austen v. Baker*, 12 Mod. 250.

(h) *Hetfield v. Dow*, 3 Dutch. 446.

(i) *Burkhalter v. Farmer*, 5 Kan. 479; *Lyons v. Thompson*, 16 Ia. 66.

(j) *Ruggles v. Gattton*, 50 Ill. 414; *Kuhn v. Brown*, 4 Th. & C. 29; *Pennell v. Pentz*, 4 E. D. Sm. 642; *Allen v. Scarff*, 1 Hilt. 212; *Cutler v. Hinton*, 6 Rand. 509; see *Beerkle v. Edwards*, 8 No. West. Rep. 342; *Cropper v. Pitman*, 13 Md. 195; *Hendricks v. Robinson*, 56 Miss. 697; *Richardson v. Richardson*, 1 McMull. 280.

self has put upon the transaction.*(k)* The manner of charging is a circumstance of strong character, to be submitted with the other evidence to the jury.*(l)* So the fact that the plaintiff presented his account to the person answered for.*(m)* That the defendant is charged does not, on the other hand, help the plaintiff's case.*(n)* It is certainly not conclusive.*(o)* "The entry in the books of the seller is often of great importance in determining to whom credit was given. Being made by the seller, it is, of course, of much greater weight when against him than when it sustains his claim. If, on production of plaintiff's books, it appears that the defendant was not originally debited there, but that the goods were charged against the person receiving them, this fact, if unexplained by other circumstances, would be very strong, if not conclusive evidence that credit was given to the person receiving the goods."*(p)* That the goods were charged to the defendant may, with other circumstances showing that he alone was relied upon, take the case out of the Statute of Frauds.*(q)* The following are some examples of guaranties shown to be such by evidence of the plaintiff's books. Thus, where the promisee agreed to pay for goods to be delivered to C. P. D., and the latter was charged with them, and the bills made out to him, the evidence showed a guaranty.*(r)* Where both par-

(k) *Dixon v. Frazee*, 1 E. D. Sm. 34, the court saying: "The construction which the parties themselves put upon agreements of this kind has long been regarded as important, and oftentimes conclusive of its true character, and the important inquiry is, therefore, said to be to whom was the credit given? In this case the plaintiff has put his own construction upon the agreement. He charged the goods not to the defendant, in reliance upon the assurance he received from him, but to Frazee and Sickles (a firm consisting of the defendants and Isaac and another person), and afterwards to Isaac Frazee, and he persisted in that construction for nearly four years, settling the account, taking notes, as if no

such person as the defendant was in being."

(l) *Myer v. Graffin*, 31 Md. 354.

(m) *Homans v. Lombard*, 8 Shep. 313.

(n) *Cutler v. Hinton*, 6 Rand. 509; see *Farwell v. Dewey*, 12 Mich. 442.

(o) *Cowdin v. Gottgetreu*, 55 N. Y. 650.

(p) *Boykin v. Dohlonde*, 37 Ala. 583, citing cases.

(q) *Dunning v. Roberts*, 35 Barb. 468.

(r) *Beebe v. Dudley*, 26 N. H. 252. And where the plaintiff, one Leland, upon the defendant, Creyon, verbally promising to be responsible for the payment thereof, sold, delivered, and charged to L. certain goods in his

ties were trusted, and the party answered for was the only one charged on the plaintiff's book, though the defendant's name was added at an obviously later time, the Statute of Frauds applies.(s)

§ 91. There are examples of a guarantor being held liable on his oral promise, though the plaintiff's books showed a charge against the person guaranteed. Thus, it has been said that the fact that the goods whose payment is guaranteed are charged to the party answered for is not conclusive, nor the fact that such person became afterwards liable to pay the price; the question is, to whom was the credit originally given?(t) So it has been said, that "as the question to whom credit was given, must depend upon the intention of the parties, the fact that the goods are charged to the person receiving them, is not conclusive, but may be explained, and made consistent with the assumption of the defendant's primary liability. Other circumstances in the case may show that the account was so kept for convenience, and to avoid confusion and misunderstanding; and that in point of fact the credit was given to the defendant, and he alone considered liable for the goods. On the other hand, if the defendant has been treated by the person selling the goods, and has himself acted as if he were the sole party liable, that, if not explained by other evidence, would be a circumstance conducing to show that his promise

Examples of manner of charging disregarded as test of liability.

books; Leland wrote, "the above articles were delivered to L., who was introduced by J. M. Creyon, who agreed to be responsible for what Mr. L. may want in merchandise; credit was given on Creyon's becoming responsible." It was held that the Statute of Frauds applied, the goods in the first instance being charged only to the principal. *Leland v. Creyon*, 1 McC. 100. In the following cases, also, the third person was in the first instance the only one charged: *Elder v. Warfield*, 7 Harr. & J. 396; *Smith v. Montgomery*, 3 Tex. 204; *Taylor v. Drake*, 4 Strobb. (Law), 436; *Brady v. Sackrider*, 1 Sandf. 515.

(s) *Dunning v. Donahue*, 12 Chic. Leg. News, 204 (Wells Co., Ill.). So, in an Illinois case, it was held that, where there was a claim against another, and the plaintiff kept books, it would require strong evidence to show that an entry was made by mistake, and ought to have been made against another man, and besides, if long afterwards, another name is added as debtor, this is evidence that the creditor did not consider this one primarily liable; *Hardman v. Bradley*, 85 Ill. 162.

(t) *Elder v. Warfield*, 7 Harr. & J. 396. See *Barrett v. McHugh*, 128 Mass. 166; *Scott v. Myatt*, 24 Ala. 493.

was not collateral.”(u) That goods were charged to the party answered for, and not to the guarantors, is *prima facie* evidence of guaranty, but may be explained by proof that the guarantor had also bought goods on his own account, and this method of charging was to prevent confusion; that the plaintiff presented his account for payment to the party answered for is also strong evidence that credit was given such person, and that the defendant’s promise was a guaranty, but even this can be explained by proof that the account was so presented at the defendant’s request; a verdict for the plaintiff, on the above evidence, will be sustained.(v) It was said in a New York case that, where credit (*semble* the whole credit) was given the defendant for goods supplied X., it does not bring the case within the Statute of Frauds, that the goods were charged to X., or that there was an agreement in the matter between the plaintiff and X.(w) The bill being in the name of the person first answered for may be explained, as where the plaintiff was the assignee of another, and the latter had expected the third party to pay, but in fact the plaintiff gave the third party no credit at all.(x) Where the entries in the books showed a charge against the third party, but the other evidence in the case an original liability on the defendant’s part, it is a question for the jury.(y) The evidence of the books is admissible even where the other proof tended to show an original promise by the defendant.(z) It is always a question of intention whether charging the goods to the person receiv-

(u) *Boykin v. Dohlonde*, 37 Ala. 584, citing *Sanford v. Howard*, 29 id. 684, and *Hazen v. Bearden*, and other cases.

(v) *Hazen v. Bearden*, 4 Sneed, 50. See *King v. Despard*, 5 Wend. 279, where the Statute of Frauds was held not to apply, though the plaintiff drew drafts upon the party answered for, this being only to give the defendant a voucher.

(w) *Hacker v. Ferrill*, 3 Th. & C. 780.

(x) *Briggs v. Evans*, 1 E. D. Sm. 195.

Goods may be furnished to and charged in books against a third party, and yet be on exclusive credit of the defendant; if so found by the jury the defendant is liable on an oral promise to pay for them; *Lyon v. Chamberlain*, 8 Amer. Law Rec. 331, S. C. Mich. See *Dean v. Tallman*, 105 Mass. 444; *Brown v. George*, 17 N. H. 129; *Lefevre v. Bank of Shippensburg*, 2 W. N. Cas. 174, S. C. Pa.

(y) *Merriman v. Liggett*, 1 W. N. Cas. 379, S. C. Pa.

(z) *Leisman v. Otto*, 1 Bush, 225.

ing them proves that the credit was given him.(a) An application of a payment may indicate who was charged.(b) Where the suit is brought against both, the presumption of course is that both were trusted, but a suit against the third party at the defendant's request will not prejudice the plaintiff.(c)

§ 92. The cases are numerous in which the sole reliance by the plaintiff upon the defendant's promise is shown in the fact that the former discontinues work done for a third person until assured by the guaranty. It not unfrequently happens, even in these cases, that the third person is still trusted to a degree, and that, therefore, the defendant's promise is within the Statute of Frauds; but in perhaps a majority of instances the promise, though oral, is original and valid; because the promissor has a leading purpose of his own in view, or because the debt has become substantially his own.(d) Thus, in a Texas case, it was said that "if the testimony should show that the intervenors, as sub-contractors, were about to abandon the work because they were apprehensive that the principal contractor would not pay them, or for other good and sufficient reason, and that to prevent this they were induced by the owner, Pool, to continue and complete their part of the work in consideration that he would pay them therefor, this would be a sufficient original understanding to take the contract without the Statute of Frauds, and to bind Pool;" the contractor, *semble*, remained liable.(e) That the third person remains liable is immaterial.(f) Where *semble* no credit is given to the person answered for, a promise to pay for services rendered such person is good, though it cover both services rendered before and those rendered after such promise.(g) Where the defendant, owner of a house, promised the plaintiff working

Continuance of work in reliance upon the guaranty.

(a) *Sanford v. Howard*, 29 Ala. 691, N. West. Rep. 233 (S. C. Neb.). See citing cases. § 72.

(b) *Whitman v. Bryant*, 49 Vt. 514.

(e) *Pool v. Sanford*, 52 Tex. 637.

(c) *Leisman v. Otto*, 1 Bush, 225. See *Richardson v. Richardson*, 1 McMull, 280.

(f) *Walker v. Hill*, 119 Mass. 249; see *Pool v. Sanford*, 52 Tex. 637, but *quære*.

(d) See *Jefferson Co. v. Slagle*, 66 Pa. St. 208; *Fitzgerald v. Morissey*, 15

(g) *Bagley v. Moulton*, 42 Vt. 188.

under C., a contractor upon the house, but who had abandoned the work, and was thereby without remedy on his original contract with C., that he, the defendant, would pay the whole amount due him, the plaintiff, if the latter would resume work, the Statute of Frauds was held not to apply.^(h) Where the defendant had a personal object to gain in having the plaintiff finish his work, the case is all the stronger.⁽ⁱ⁾ And so where the defendant had funds, out of which he can without loss to himself fulfil the promise, as, for example, where he owes money to his contractor, for whom the plaintiff had been working, and out of this money can stop the amount due the plaintiff;^(j) and so where the defendant assured the plaintiff that he would have such funds, though he afterwards denied having had them.^(k) Where the plaintiff furnished lumber to one M., and charged it to the defendant, who was advancing money to M. to build on land conveyed by the defendant to M., and the defendant said that if he got a deed of a certain house on the land he agreed to have the lumber charged to him, the Statute of Frauds did not apply, as M. was not credited and the defendant was, and as the latter had funds.^(l) But, on the other hand, where the old contract continued, the fact that the defendant promised to retain in his own hands enough of the money he owed the third person to pay the plaintiff, and though under his contract with the third person he had the right to do so, it has been held in New York that the Statute of Frauds applied, the right in the defendant to retain the funds being permissible merely, and not obligatory upon him.^(m) So in Ohio it was said that unless the third

(h) *Douglass v. Roberts*, 1 City Ct. Rep. 454; see, also, *Petrie v. Hunter*, 3 Can. L. Times, 33 Ch. Div. Ont.

(i) *Clifford v. Luhring*, 69 Ill. 401; see *Walker v. Hill*, 119 Mass. 249, citing cases. Where the plaintiff, who had been cutting timber for one A., to be used upon boats which A. was building for the defendant, refused to supply more until the defendant promised to pay him, the defendant was liable for all the timber cut in reliance upon the

promise; *Rounds v. May*, 35 U. C. Q. B. 368.

(j) *Kutzmeyer v. Ennis*, 3 Dutch. 374; *Estabrook v. Gebhart*, 32 Ohio St. 420; *Cock v. Moore*, 18 Hun, 32; see *McKeenan v. Thissel*, 33 Me. 368; see, however, *Ware v. Stephenson*, 10 Leigh, 155.

(k) *Hiltz v. Scully*, 1 Cinc. 557.

(l) *Booth v. Heist*, 37 Leg. Int. 300; 94 Pa. St. 177.

(m) *Weyer v. Beach*, 14 Hun, 237.

person assented to the new arrangement the Statute of Frauds applied.(n) Where the plaintiff had refused to be employed at all by the third person the case is clear, and the defendant is liable.(o) In Pennsylvania the promise is regarded as one to pay the defendant's own debt, though the goods were furnished and charged to the contractor, and though the debt apart from the promise would not have been the defendant's personal obligation, the claim giving rise, however, to a lien on the defendant's land.(p) Mere forbearance to assert a lien, and continuing to work for the party, guaranteed on the faith of the guaranty, will not take the latter out of the Statute of Frauds, even on the ground of part performance.(q)

§ 93. The important distinction is between the claim of the plaintiff for work done or materials furnished after the defendant's promise, and that which was before such promise: the former promise when severable being valid though oral, the latter not.(r) Thus where a sub-contractor threatened to leave work because he could get no money from the contractor, and the owner of the building promised to pay him, it was held that for all work done after the promise, the latter was original and valid though oral.(s) In an important case in Massachusetts where the plaintiff contracted to do certain work for W., but stopped his labor because of W.'s failure to pay under contract, and the defendant told him to finish the contract and he would pay him in full, the plaintiff recovered for the work done after such promise.(t) And the rule applies though the third person was also charged.(u) And evidence will be received to ascertain how much of the claim accrued after the defendant's promise.(v) Where the defendant promised

Claim for work, etc., done before the guaranty, and that for work, etc., done thereafter.

(n) *Birchell v. Neaster*, 36 Ohio St. 337.

(o) *Alger v. Johnson*, 6 Th. & C. 632; 4 Hun, 412.

(p) *Landis v. Royer*, 59 Pa. St. 98; but see *Haverly v. Mercur*, below; see *Devlin v. Woodgate*, 34 Barb. 252.

(q) *Brightman v. Hicks*, 108 Mass. 246; *Darlington v. McCunn*, 2 E. D. Sm. 412.

(r) *Schoenfeld v. Brown*, 78 Ill. 489; *Bonine v. Denniston*, 41 Mich. 294; *Warwick v. Grosholz*, 3 Grant (Pa.), 235.

(s) *Chesterman v. McCostlin*, 6 N. Y. Leg. Obs. 112, N. Y. S. C.

(t) *Rand v. Mather*, 11 Cushing, 1; see *Allen v. Leonard*, 16 Gray, 202.

(u) *Owen v. Stevens*, 78 Ill. 463.

(v) *Luce v. Zeile*, 53 Cal. 54.

the plaintiff that if he would not refuse to deal with one R., but would let him have goods, he would see that they were paid for, and the plaintiff who had told the defendant that he would give no further credit to R., induced by this promise supplied R.: it was held as to the subsequent supply of goods that the promise was original and not within the Statute of Frauds.(w) Where the debt owed by the third person is entire and covers both the matter before and that after the promise, and the latter was not severable the Statute applies to both.(x) In a case in the Queen's Bench of Upper Canada this rule appears to have been violated, though the ruling may be perhaps sustained on the principle that the defendant was paying his own debt, or one connected with his property, the facts were that an employé getting out timber for one M., continues to do so for the defendant, M.'s assignee, relying on a promise by the latter to pay him as well for that work as for what M. owed, the Statute of Frauds was held not to apply.(y) By usage of the country such contracts are regarded

(w) *Hartley v. Varner*, 88 Ill. 562. Where "it was proved that the plaintiff, with other laborers, had worked on section ninety-seven of the Illinois Central Railroad for Styles & Co., who were sub-contractors under the defendants; that one month's pay was due them and unpaid, and that they refused to work longer on that account; that the defendant then told them to go to work for them and open a new pit so the defendants could measure their work and distinguish it from their work done for Stiles & Co.; that the plaintiff's labor was worth \$125. The court held that there was evidence for a jury of an original promise on the defendant's part;" *Smith v. Kahill*, 17 Ill. 68.

(x) *Bonine v. Denniston*, 41 Mich. 294. Thus the syllabus of a modern New York case reads that: "W. & V. being indebted to the plaintiff for sawing lumber at their mill, conveyed their property to the defendant, who hired

the plaintiff to continue the running of the mill, saying that he would pay him the same that W. & V. had paid him, and saying further, that he had made arrangements with W. & V. to pay their debt to the plaintiff, and would pay him the back pay that was coming to him; it was held, that the agreement to pay W. & V.'s debt was void under the Statute of Frauds." And the court said, "But the continuance by the plaintiff of the work of manufacturing said logs for the same price he had previously received of Ward & Van Vicker was no more a good consideration for such a promise than was the promise of a party to sell goods for their full value to a solvent debtor a good consideration for a promise to pay the debt of a third person;" *Belknap v. Bender*, 4 Hun, 414; 6 Th. & C. 613.

(y) *Tumblay v. Meyers*, 16 U. C. Q. B. 145. See, however, *Poucher v. Treahay*, below.

when assigned as carrying all the rights and liabilities in the matter of wages. The rule generally is that the two parts of the defendant's promise must be severable, and that only is valid under the Statute of Frauds which relates to the work done or materials furnished in reliance upon the promise. Thus, in a case already cited, where the plaintiff had agreed to furnish goods to M., who was building a house for the defendant, and had charged them to M., but had also afterwards agreed with the defendant to deal directly with him, it was a question for the jury whether the contract was new and original, or only in the furtherance of the first contract with M.; if the latter, the Statute of Frauds applied; *secus, secus.*(*z*) Where the buildings for which the plaintiff furnished materials were to be the defendant's property when finished, and the plaintiff refused to trust the contractor, and would not go on till the defendants made themselves responsible, and the suit was, *semble*, both for the materials furnished before and some furnished after the promise, the court, in a New York case, held that if any liability remained in the contractor, the Statute of Frauds applied.(*a*) Where the plaintiff was employed by A., the defendant's building contractor, who gave him orders on the architects, who paid a small sum thereon, and afterwards A. failed, and the plaintiff stopped work for several weeks, but resumed work upon the defendant's telling him that it would be all right, it was held that the Statute of Frauds applied, A. being still liable.(*b*) Where the defendant

(*z*) *Bonine v. Denniston*, 41 Mich. 294; see also *Ingersoll v. Baker*, 39 id. 158; 41 id. 50.

(*a*) *Payne v. Baldwin*, 14 Barb. 571, distinguishing *King v. Despard* as a case where the whole credit was given to the defendant. Where the plaintiff contracted with a water company to construct for them a ditch, to be paid out of the sales of the water; B., a co-defendant, held a mortgage upon the ditch, which, after the work was done by the plaintiff, fell due; the plaintiff refused to go on with the work; and B. agreed with the plaintiff to pay him

out of the sales of the water, if he would go on; it was held that this should be in writing as a guaranty; *Ellison v. Jackson*, 12 Cal. 553.

(*b*) *Poucher v. Treahy*, 37 U. C. Q. B. 370. So where the plaintiff did brick-work for A., who was building for the defendant; the latter promised the plaintiff, who had refused to continue work, that if he would do so he would pay if A. did not; the plaintiff did not discharge A., and it was held that A. continuing liable, and the defendant not being liable except under the parol promise, that the latter was a guaranty

had become purchaser at sheriff's sale of a tailoring business of one A., who was indebted to the plaintiff, and this debt the defendant promised to pay the plaintiff before he would go on with the work in the establishment, the Statute of Frauds was held to apply.(c) Where the plaintiff, a sub-contractor, feeling uneasy as to getting his pay from the contractor over him, expressed his doubts to the defendant, who was president of a company for which the work was being done, and the defendant persuaded him to go on by a promise to see the debt paid; it was held that as there was no abandonment of the original sub-contract, but the plaintiff continued to work as before, there was not enough to make the case an exception to the Statute of Frauds, which was held to apply.(d) The following cases illustrate this principle: Where H., a third person, was a contractor building on the defendant's property, and to whom the defendant was advancing money, and the latter promised the plaintiff that if he would continue his work he should be paid; it was held that the Statute of Frauds applied, H. remaining liable.(e) Where the plaintiff showed that when about to complete the work, he had said to the defendant, *I want you to agree to pay me for the building of the house, or I can do no more to it*, and that the defendant said in reply, *do you go on and finish the house, and I will pay you for it, or see you paid*, and that thereupon the plaintiff went on and finished the house; the court said "when an agreement is auxiliary to a subsisting agreement, which remains in force for the party now claiming on the new contract, then the new contract is collateral to the other, and must be in writing. It is within the Statute. But when the first contract is rescinded, superseded, or abandoned, so as not to be in force in the plaintiff's favor, then the new contract is independent, and is not within the Statute. But if the terms be uncertain, equivocal, or ambiguous, then it must always be left to the jury to find whether, in fact, the

invalid within the Statute of Frauds; and that A. was insolvent does not of itself end his liability; Bond v. Treahay, 37 U. C. Q. B. 365.

(c) James v. Balfour, 7 Ont. App. 462.

(d) Haverley v. Mercur, 78 Pa. St. 257; 1 W. N. Cas. 348; see Bresler v. Pendell, 12 Mich. 227.

(e) Gill v. Herrick, 111 Mass. 503.

former contract was to continue, or whether the whole was abandoned, and the new contract and credit substituted in its place. In this case there was nothing in the terms used which shows *as matter of law* whether the prior contract was to continue or not. That was a question of fact for the jury to find.”(f) To induce the plaintiff to trust his contractor, the defendant promised to answer for material furnished by the plaintiff to the contractor, to be put in the defendant’s house: the Statute of Frauds was held to apply.(g) A promise by the defendant to pay W. for lime previously sold by him to K., who was putting up a building for the defendant, should be in writing and express a consideration.(h)

§ 94. The authorities just discussed suggest a test to ascertain whether the Statute of Frauds applies, which is very commonly resorted to, and which, while undoubtedly

(f) *Sinclair v. Richardson*, 12 Vt. 38; see *Tompkins v. Smith*, 3 St. & Por. 55. Where the plaintiff continues work which he had been doing for K., who had left the state, upon a promise by the defendant to pay, the Statute of Frauds applies, the defendant having no interest in the matter, and K. remaining liable; *Puckett v. Bates*, 4 Ala. 391.

(g) *Clay v. Walton*, 9 Cal. 333, citing *Puckett v. Bates*. Where a declaration alleged that the plaintiff had been in the employment of L., and that money was due him from L. on account of such employment; that L. being in failing circumstances, he, on account thereof, refused to continue in such employment; that defendant thereupon, in consideration that the plaintiff would go on and continue in such employment, undertook and promised to pay the plaintiff what was due and should become due him, by reason of such employment, from L.; that the plaintiff did, in consideration thereof, go on and perform work and labor for L.; that there was due him for such

work and labor done and performed, before and after said promise and undertaking, the sum of \$208.75, and that the defendant refused to pay the same. The court said: “It is insisted that the plaintiff may recover at least for work done for L. after the making of the promise of the defendant. To this position we reply, that the promise alleged is to pay the debt due and to become due from L., for which L. is answerable to the plaintiff, and is wholly dependent upon, and collateral to, such debt and liability.

We understand both counts as based upon the debt and liability of L., and not upon an original promise from the defendant to the plaintiff, founded upon a consideration moving from the promisor to the promisee, and such is the fair construction of the counts taking the allegations in them most strongly against the pleader. We hold the promises as stated in both counts within the Statute, and the plea therefore a good answer to them;” *Hite v. Wells*, 17 Ill. 90.

(h) *McDonell v. Dodge*, 10 Wis. 110.

sound as far as it goes, has not the exclusive virtue sometimes claimed for it. No one will deny, however, that if the person whose debt is assumed by a guarantor remains still liable to his creditor, a *prima facie* case of a guaranty within the Statute of Frauds is shown, and for this plain proposition there is abundance of authority.⁽ⁱ⁾ But to say that whenever the third person is liable the Statute necessarily applies, would be to deny well-settled exceptions to the latter, those, viz: of the promise made in consideration of funds; the promise made to the debtor; the promise to pay a debt which is also that of the promissor or one resting on

(i) *Fish v. Hutchinson*, 2 Wilson, 94; *Matson v. Wharam*, 2 T. R. 80; *Oldham v. Allen*, cited in 2 Cro. & Mees. 433; *Rounce v. Woodyard*, 8 L. T. 186; *Poucher v. Treahay*, 37 U. C. Q. B. 370; *James v. Balfour*, 18 Can. Law Journ. 366; 2 Can. L. T. 366; 7 Ont. App. 461; *Mason v. Hall*, 30 Ala. 601; *Boykin v. Dohlond*, 37 Ala. 582; *Marx v. Bell*, 48 Ala. 499; *Kurtz v. Adams*, 7 Eng. (Ark.) 177; *Peabody v. Harvey*, 4 Conn. 119; *McGaughey v. Latham*, 63 Ga. 68; *Everett v. Morrison*, Breese, 49; *Chilcote v. Kile*, 47 Ill. 89; *Dunning v. Donahue*, 12 Chic. Leg. News, 204 (Wills Co., Ill.); *Nelson v. Hardy*, 7 Ind. 367; *Ellison v. Wischart*, 29 Ind. 34; *Westheimer v. Peacock*, 2 Iowa, 531; *Waggener v. Bells*, 4 Mon. 9; *Smith v. Fah*, 15 B. Mon. 443; *Day v. Cloe*, 4 Bush, 563; *Graves v. Scott*, 23 La. Ann. 692; *Richardson v. Williams*, 49 Me. 558; *Rowe v. Whittier*, 21 id. 550; *Blake v. Parlin*, 22 id. 397; *Moses v. Norton*, 36 id. 113; *Hill v. Raymond*, 3 Allen, 540; *Tileston v. Nettleton*, 6 Pick. 509; *Stone v. Symmes*, 18 id. 469; *Cahill v. Bigelow*, id. 369; *Richardson v. Robbins*, 124 Mass. 107; *Brown v. Hazen*, 11 Mich. 221; *Bresler v. Pendell*, 12 id. 227; *Farwell v. Dewey*, id.

442; *Waldo v. Simonson*, 18 id. 345; *Baker v. Ingersoll*, 39 id. 158; *Gower v. Stuart*, 40 id. 747; *Wilson Sewing Machine Co. v. Schnell*, 20 Minn. 40; *Nichols v. Allen*, 22 id. 283; *Wallace v. Wortham*, 25 Miss. 119; *Hendricks v. Robinson*, 56 id. 697; *Deegan v. Conzelman*, 31 Mo. 427; *Glenn v. Lehnen*, 54 id. 52; *Holmes v. Knights*, 10 N. H. 176; *Hetfield v. Dow*, 3 Dutch. 446 (citing *Leonard v. Vredenburg*); *Dixon v. Frazee*, 1 E. D. Smith, 35; *Wilt v. Platt*, 3 City Hall Record (N. Y.), 71; *Read v. Ladd*, 1 Edmon. Sel. Cas. 102; *Knox v. Nutt*, 1 Daly, 213; *Doolittle v. Naylor*, 2 Bosw. 224; *Wilson v. Roberts*, 5 id. 107; *Larson v. Wyman*, 14 Wend. 246; *Payne v. Baldwin*, 14 Barb. 570; *Rogers v. Rogers*, 6 Jones, 303; *Haverly v. Mercur*, 78 Pa. St. 257; 1 W. N. Cas. 348; *Wood v. Patch*, 11 R. I. 446; *Simpson v. Nance*, 1 Spear, 7; *Matthews v. Milton*, 4 Yerger, 576; *Skinner v. Conant*, 2 Vt. 453; *Whitman v. Bryant*, 49 Vt. 514; *Waggoner v. Gray*, 2 Hen. & Mun. 611; *Noyes v. Humphreys*, 11 Gratt. 636; *Ware v. Stephenson*, 10 Leigh, 155; *Emerick v. Sanders*, 1 Wis. 92; *Taylor v. Pratt*, 3 id. 692; see *Smith's Contr.* (6th Am. ed.), 96.

his property ; and the more doubtful exception of a promise made upon a new consideration moving to the promissor, and of a promise made under a leading purpose which the promissor had in view. Some authorities would appear to go to this length : (j) The general rule has been stated in various ways. Thus it has been said that, where both parties are looked to, the guaranty is within the Statute of Frauds ; (k) and that the Statute of Frauds applies to "an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable." (l) So if the persons who procured the goods are liable, then, under a rule long established, the promise would be collateral. (m) Or where the promise is founded upon the original liability. (n) It has been said that the whole credit must be given to the defendant, or the Statute of Frauds applies. (o) And that the rule undoubtedly is that, if the credit is not given to the person who undertakes to be responsible for goods delivered to another, his undertaking is collateral, and must be in writing ; it is, in such case, in aid of the liability of such other. (p) So in a Massachusetts case it was said that a direction to the jury, that the defendants would be guarantors only if the sole credit was given to H. (the person answered for), was held to be incorrect ; the court below should have added that defendants would have been guarantors unless the whole credit was given to them, and that, if any credit (not merely the sole credit) were given to H., the defendants would have been only guarantors ; the court, however, expressly excepted the case of a joint contract. (q) So it has been said that the gen-

(j) See many of the cases cited in debt was a collateral engagement within the Statute, required a writing the last note.

(k) *Birkmyer v. Darnell*, Salk. 27 ; to prove it, and a new consideration to support it ; *Hayden v. Weldon*, 43 N. S. C., S. N., *Bour Kamire v. Darnell*, Mod. Cas. 248 ; 1 Sm. L. C. (Am. J. Law, 130.

(l) *Packer v. Benton*, 35 Conn. 349. (n) *Hughes v. Lawson*, 31 Ark. 613.

(m) *Sanford v. Howard*, 29 Ala. 691, citing cases. Where the contract creating the debt was fully consummated, the alleged promise of the defendant to pay or further secure the (o) *Brady v. Sackrider*, 1 Sand. 515 ; *Smith v. Montgomery*, 3 Tex. 204 ; *Norris v. Graham*, 33 Md. 58.

(p) *Dixon v. Frazee*, 1 E. D. Sm. 34. (q) *Swift v. Pierce*, 13 Allen, 136.

eral current of all the more recent decisions is, that if the party to whom the goods are delivered, or for whose benefit a service is performed, incurs thereby a debt so that he is liable in any way for it, then the undertaking of another, in aid of his liability and collateral to it, must be in writing, notwithstanding the collateral undertaking may have been in fact the principal inducement to the delivery of the goods or the performance of the service. In other words, if any credit is given to the party who receives the benefit, the undertaking of the other is collateral, and voidable unless in writing.^(r) That both the contract—*i. e.*, the original contract—and the guaranty are contemporaneous makes no difference if the former continues.^(s) In a New Hampshire case the continuing liability rule was laid down, but an extreme application of it was deprecated.^(t)

§ 95. The following are examples of promises held to be within the Statute of Frauds, because the person answered for remained liable: Thus, in a Massachusetts case, the court said: "The promise of the defendant was to pay for work already done by the intestate for B., without any previous contract with or employment by the defendant. The defendant owed B. nothing, and received no consideration either from B. or from the intestate for his promise. The intestate neither did any work nor paid any money upon the faith of this promise, nor gave up any right or security against B. Their original liability to him was not altered or affected by the defendant's promise. This promise was therefore clearly a promise to answer for the debt of another; and not being in writing was within the Statute of Frauds."^(u)

Where the old contract continues, and the contract of guar-

(r) Walker v. Richards, 39 N. H. 264, citing cases.

(s) Bloom v. McGrath, 53 Miss. 257; see § 96 *et seq.*; see § 31.

(t) Holmes v. Knights, 10 N. H. 176, acknowledged as authority, but reluctantly in Proprietors v. Abbott, 14 N. H. 159.

(u) Manley v. Geagan, 105 Mass. 447. Where a tenant assigned his lease, and the assignee promised the landlord that if he would assent to the assignment he, the assignee, would pay the assignor's arrears, it was held to be a guaranty within the Statute of Frauds; Fowler v. Moller, 4 Bosw. 154.

anty contains no new terms or conditions except the guaranty itself, the Statute of Frauds applies.(v) As has been seen in an early part of the present discussion, a guaranty on consideration of forbearance is within the Statute if the original liability subsists.(w) Thus, where the defendant, a creditor of a tenant whose goods have been distrained for rent, promises to pay the plaintiff for taking care of the goods, etc. (the plaintiff acting on the defendant's behalf and in his interest), the court thought the landlord also liable for these as necessary expenses of the distress, and that the defendant's promise was a guaranty, and being verbal was invalid under the Statute of Frauds.(x) An early case in New York went to great length in this direction; the facts were that the defendant below induced the plaintiff not to proceed in execution upon his claim against one M. J., and that he, the defendant, had taken M. J.'s property and meant to pay his debts; although the court thought that the defendant was trustee for M. J.'s creditors, and that his absolute promise was evidence that the fund was sufficient, yet held, as the original debt subsisted, that the Statute of Frauds applied.(y) Where one L. transferred to the defendant a contract he had to carry mails, and the defendant asked the plaintiff who had done the actual carrying for L. to continue doing so for him, the defendant, and promised to pay him, it was held that the contract between L. and the plaintiff remaining in force, the defendant's promise was within the Statute of Frauds.(z) A contract of retainer

(v) *Weyer v. Beach*, 14 Hun, 237.

(w) *Watson v. Randall*, 20 Wend. 204; *Krutz v. Steward*, 54 Ind. 181.

(x) *Colman v. Eyles*, 2 Stark. 62.

(y) *Jackson v. Raynor*, 12 Johns. 291. In a recent decision of the Supreme Court of New York, where there was evidence that the sole credit was given the defendant, and on this a verdict for the plaintiff might have been sustained; but there was also evidence the other way, a refusal to charge that if the defendant was not solely trusted the Statute of Frauds applied caused the decision to be reversed; the de-

fendant, when he made the promise, said that he would come and choose the goods; he did not do so, but the person for whom the defendant said he was guarantor came and chose the articles; *Burgdorf v. Odell*, 17 N. Y. Week. Dig. 542.

(z) *Newell v. Ingraham*, 15 Vt. 422. Where the defendant was indebted to one V., who was to a less amount indebted to the plaintiff, a promise by the defendant to the plaintiff to pay V.'s debt is within the Statute, V. not being discharged; *Stanley v. Hendricks*, 13 Ired. 86.

by a third person of counsel cannot be implied from circumstances where there has been a contract between such attorneys and the real clients that the attorneys shall act as counsel; for there would be a collateral agreement proved by parol.(a) In a Vermont case the continuing liability rule was laid down unqualifiedly, but the facts did not really raise any question of the Statute of Frauds, and was moreover a plain guaranty for other reasons.(b) Most of the authorities cited in support of the unqualified rule that if there is any liability in the person answered for the Statute of Frauds applies are, as has been seen, examples of bald guaranties without a circumstance in the case to furnish a reason for making an exception to the Statute of Frauds. The following note shows some further examples in the same direction.(c)

§ 96. Between the rigid rule that if any liability subsists in the person answered for the Statute of Frauds applies, and the more liberal view that this is only a *prima facie* test, authority for every shade of distinction and difference can be found.(d) Serjeant Williams said that the application of the Statute depends on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from the express promise.(e) In a Pennsylvania case it was said that if the original debt remains the Statute of Frauds applies, unless the promissor is put in funds, or in such cases "of perhaps a kindred nature in which the contract shows an intention of the parties that the new promissor shall become the principal debtor, and the old debtor become but secondarily liable.(f)

(a) *Moshier v. Kitchell*, 87 Ill. 20. contradictory dicta, but which tend, on the whole, to the later and better rule.
(b) *Smith v. Hyde*, 19 Vt. 56; citing *Barber v. Fox*, 2 Saund. 136; which does not sustain this ruling.

(c) *Rhodes v. Leeds*, 3 Stew. & Port. 213; *Eddy v. Roberts*, 17 Ill. 505; *Hollingsworth v. Martin*, 23 Ala. 597; *Scott v. Thomas*, 1 Scam. 58; *Cahill v. Bigelow*, 18 Pick. 369; *Aldrich v. Jewell*, 12 Vt. 126. (e) *Forth v. Stanton*, 1 Saund. 211 (e); (notes by Serjeant Williams and Sir E. V. Williams); and see *Fennel v. Mulcahey*, 8 Ir. L. R. 434; *Furbish v. Goodnow*, 98 Mass. 297, citing and considering a number of cases.

(d) See *Sweatman v. Parker*, 49 Miss. 26, containing confused and given above.
(f) *Maule v. Bucknell*, 50 Pa. St. 50, and citing Serjeant Williams's rule

§ 97. A singular view of the "subsisting liability" test was laid down by Judge Story, and one which was so subversive of that principle that even those, who deny that this liability is anything but one test of many to ascertain the validity of an oral guaranty, would join with those who support the old rule in its entirety in repudiating Judge Story's distinction. According to his idea, there may be such a thing as a liability by one person to a certain creditor, and a promise to the same creditor in the same matter by another person, and yet the engagement of the latter be not connected with the first promise, so as to make the latter a guaranty. Thus, Judge Story says that "if A. agrees to advance B. a sum of money, for which B. is to be answerable, but, at the same time, it is expressed to be upon the undertaking that C. will do some act for the security of A., and enter into an agreement with A. for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather, if one might use the phrase, a tri-lateral contract. The contract of B. to repay the money is not coincident with, nor the same contract with C. to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A., not solely upon the promise of B. or C., but upon the promise of both *diverso intuitu*, and each becomes liable to A., not upon a joint but a several original undertaking. Each is a direct original promise founded upon the same consideration. The credit is not given solely to either, but to both, not as joint-contractors on the same contract, but as separate contractors upon coexisting contracts, forming part of the same general transaction." The facts of the case which brought it, in Judge Story's opinion,^(g) within the theory just stated were as follows: Rabaud & Co. sued James D'Wolf, Jr., for damages, for not selling them certain sugar. B., one of the plaintiffs, and a partner of Rabaud & Co., agreed with James D'Wolf, Jr., and

The "tri-lateral liability" theory of D'Wolf v. Rabaud.

(g) D'Wolf v. Rabaud, 1 Pet. (S. C.) 501, S. C. below, before Thompson, J., 1 Pai. C. C. 589; the latter thought the contract good because the guaranty and the original promise formed but one transaction, 1 Sm. L. C. (7th Am. ed.) 503; Smith, Contr. (6th Am. ed.) 96, inclining to Story's theory.

one George D'Wolf, that in consideration of Rabaud & Co. allowing George to draw on them for a hundred thousand francs, he, James D'Wolf, would ship Rabaud & Co., on George's account, certain sugars. The following writing was put in evidence: "Mr. James D'Wolf, Jr., you will please ship for my account . . . five hundred boxes white sugar consigned to Messrs. Rabaud . . . George D'Wolf (sgd). Agreed to. James D'Wolf, Jr. (sgd)." And it will be seen, therefore, that there was written evidence to prove all the contract except the consideration, and as the court held that this under the Statute of Frauds could be orally proved no question really came up as to whether the arrangement before them was a guaranty or not. In a later case Judge Story seems still to cling to his theory, and added the further still more doubtful statement, that "if A. says to B., pay so much money to C. and I will repay you," the promise is not a guaranty.^(h) In this case Judge Story said:⁽ⁱ⁾ "In cases not absolutely closed by authority, this court has already expressed a strong inclination not to extend the operation of the Statute of Frauds, so as to embrace original and distinct promises made by different persons at the same time upon the same general consideration." "If," he continued, "A. says to B., pay so much money to C., and I will repay you, it is an original, independent promise." There are certainly some cases which so far look towards the D'Wolf v. Rabaud theory, in that they say that where the defendant undertook unqualifiedly to pay the plaintiff a certain sum, the fact that such a sum was due the plaintiff by a third person, will not make the defendant's promise a guaranty, if the defendant in making his promise paid no attention to the third person; these cases, which, as will be seen, are doubtful in themselves, do not, perhaps, go the length of D'Wolf v. Rabaud, though their tendency is the same. Thus, where on the back of a promissory note made to a third person the defendant wrote and signed, "I will pay the above at maturity;" the promise was held to be original.^(j) In contracts not in

(h) Townsley v. Sumrall, 2 Pet. 182; (i) Id.
 if the payment to C. is not a gift, it is (j) Fowler v. McDonald, 4 Cr. C. C.
 certainly *prima facie* a guaranty. See 297; see Leisman v. Otto, 1 Bush, 225.
 § 6.

writing, although the undertaking is for the benefit of another and the party may expect and be entitled to indemnity from such other person; still, if such other person be not holden directly to the same person to whom the contract in question is made, and for the same thing, so that the one is collateral to the other, the contract is not within the Statute of Frauds, but is an independent original contract between the parties to it, and will stand or fall by its own terms.^(k) There is a New Hampshire decision which goes far to support the theory of *D'Wolf v. Rabaud*; it was a promise of indemnity for becoming bail, and the court said: "The fact that the prisoner (for whom the plaintiff went bail at the defendant's request, and upon the latter's promise to indemnify him, the plaintiff) must, or may have assented to the arrangement, does not create any liability in the prisoner, to which the defendant's promise could have been collateral; nor if the prisoner had requested the plaintiff to go his bail would it have made him liable, if the plaintiff acted upon this request, but upon the defendant's promise to indemnify him. If the prisoner were liable to the plaintiff on an implied assumpsit as having requested him to go bail the defendant's promise might still be collateral, and the implied liability of the prisoner and express liability of the defendant would be independent of each other, and indeed, the liability of the prisoner is, if any, the collateral

(k) *Robinson v. Potter*, 21 Law Report., N. S. 554, S. C. Vt. The following case is a good deal like the theory of *D'Wolf v. Rabaud*: R. owned a mill and property upon which the defendant had a mortgage which was foreclosed, and the defendant became the purchaser and got the sheriff's certificate: R. had a year to redeem the property. Just after the sale, machinery in the mill was destroyed, and the plaintiff was willing to make repairs if he could get the defendant to protect him, if R. did not pay. The plaintiff and the defendant then made a certain arrangement, i. e., that the plaintiff was to look to R. for his money, on the

condition that R. redeemed: if R. failed to do this, then the plaintiff should have the use of the mill for a certain sum for one year after the time the defendant would be entitled to it. R. also agreed to repay the plaintiff for his outlays. In pursuance of the contract the plaintiff made repairs; R. failed to redeem, and the defendant took the conveyance and now denies his contract. The plaintiff then sued for his outlays and the mill. The court held that the contract was not to answer for the debt of another, the contract with R. being for one thing, the contract with the defendant being entirely different; *Beach v. Jones*, 50 Ind. 531.

agreement.(l) Where the agent of persons selling a machine guaranteed its usefulness in a different way, and on different terms from the liability which the law would imply on the part of the principals, and he has interest in the sale for a commission, his promise is not a guaranty within the Statute of Frauds, but an independent contract.(m) It has been said that the endorsement of a note is not a guaranty in the sense of the Statute of Frauds, it is a new contract between the endorser and the endorsee.(n).

§ 98. The theory as to an oral guaranty being valid when contemporaneous with the contract answered for has been already discussed, and the distinction long since decided to be of no value; it may be doubted whether *D'Wolf v. Rabaud* is not the same doctrine but slightly changed in the manner of statement.(o) This case, or rather the dictum contained in it, has been frequently criticized and denied.(p) In a Michigan case the trilateral theory is met with some force. One Welch was sued as responsible for a debt for which C. was also responsible; the court said: "Under no theory of this case could Cook and Welch both be responsible to plaintiff severally, at his option. If Cook was liable for the meats furnished after the arrangement with Welch was made, then clearly Welch's liability could not be an original one. It is equally clear, that if Welch's promise was an original promise, and the debt his debt, then Cook could not be held liable thereon. The parties might have made an agreement under which they would have been jointly liable, which is not claimed in this case. But they could not under the circumstances be severally liable at the plaintiff's

(l) *Holmes v. Knights*, 10 N. H. 176; see *Macey v. Childress*, 2 Tenn. Ch. 445, considering *Holmes v. Knights*, as supporting *D'Wolf v. Rabaud*; see *Reader v. Kingham*, 13 C. B. N. S. 352; 7 L. T. N. S. 789 (§ 100), which superficially resembles *D'Wolf v. Rabaud*, but which goes on another principle.

(m) *Hull v. Brown*, 35 Wis. 657, citing cases.

(n) *Spann v. Baltzell*, 1 Flor. 313.

(o) See § 31; see *Bloom v. McGrath*, 53 Miss. 257; *Morse v. Mass. Bank*, 1 Holmes, 213; see dictum of Sharswood, J., in *Merriman v. Liggett*, 1 W. N. Cas. 379 (S. C. Pa.), favoring (*semble*) *D'Wolf v. Rabaud*.

(p) *Carville v. Crane*, 5 Hill, 484; *Hetfield v. Dow*, 3 Dutch. 445; *Macey v. Childress*, 2 Tenn. Ch. 442, admitting that *Holmes v. Knights* favors *D'Wolf v. Rabaud*.

option. We know of no better test than this in a case like the present.”(q)

§ 99. According to modern law (as has been said a number of times) the fact of a subsisting liability is only one of many tests whereby to learn whether the Statute of Frauds applies, and where there is such liability on the part of the person answered for, the engagement of a third person for the same debt or obligation is *prima facie* a guaranty; nevertheless should the case come within any of the exceptions to the Statute, the fact of the subsisting liability amounts to nothing (r) In a well-known Vermont case it is said that while the authorities do not agree as to what exceptions take a promise out of the Statute of Frauds, they all agree that there may be circumstances which will do so, although the person answered for remains liable.(s) And in the case of an exception to the Statute it has also been said that “the existing relations between the original debtor and creditor need not necessarily be changed, or the debt cancelled, or in any manner affected by such promise; whether they are or not, must depend upon the terms of the new contract, but in either event it can make no difference with the operation of the Statute. But in cases where the consideration for the promise affects only the original debtor or creditor, and the promissor derives no advantage from it, then it is necessary that the original debt should be affected so as to change or discharge the liability of the original debtor.”(t) So it has been said that in all cases founded upon a new and original consideration of benefit to the defendant or harm to the plaintiff moving to the party making the promise, the subsisting liability of the original debtor is no objection to the recovery.(u) Where the promissor is put in funds the continuing liability of the third person makes no difference.(v) Or where

Continuing
liability
test not
conclusive.

(q) Welch v. Marvin, 36 Mich. 61.

(s) Fullam v. Adams, 37 Vt. 394.

(r) McKenzie v. Jackson, 4 Ala. 232; Helms v. Kearns, 40 Ind. 129; Walker v. Jones 10 West. L. J. 319 (Ky.); Stewart v. Campbell, 58 Me. 443; Small v. Shaeffer, 24 Md. 156; Tallman v. Bressler, 65 Barb. 378; Robinson v. Gilman, 43 N. H. 490; Beaman v. Russell, 20 Vt. 216.

(t) Cross v. Richardson, 30 Vt. 647; see Calkins v. Chandler, 36 Mich. 324.

(u) Ludwick v. Watson, 3 Or. 256.

(v) Stilwell v. Otis, 2 Hill, 149, citing several cases; Dock v. Boyd, 93 Pa. St. 92; Rupp v. Teihl, 29 Leg. Int. 245 (C. P. Cumberland Co. Pa.).

the guarantor in making the guaranty is really paying his own debt.*(w)* As in fulfilling a stipulation in a deed poll, of which he is the grantee.*(x)* Or where the plaintiff surrendered an advantage to the defendant.*(y)* Or where the promise is not made to the creditor of the person answered for.*(z)* Or there has been a new consideration moving to the guarantor.*(a)* Or where the sole credit has been given to the guarantor after the date of the guaranty.*(b)* Or where the promise was to one already liable for the debt guaranteed.*(c)* Where the guaranty is entirely disconnected from the debt answered for, as where to get rid of a lien upon their property the promissors agreed to pay the debt which was the foundation of the lien, it has been thought the engagement, though a guaranty in form, was really a separate promise, and that there was no outstanding debt to which it was collateral.*(d)*

§ 100. The next point in logical order is one clear of all dispute, and none will claim that the Statute of Frauds can apply if there is no liability on the part of the person answered for.*(e)* The following are a variety of examples of oral promises valid, because there was no liability in the third person. Thus a promise to procure a guaranty.*(f)* Where the promise is not

Where no liability in third person, Statute does not apply.

(w) Oldfield *v.* Lowe, 9 B. & C. 77; Lee *v.* Newman, 55 Miss. 373.

(x) Goodwin *v.* Gilbert, 9 Mass. 510.

(y) Fears *v.* Story, 11 Report. 638 (S. C. Mass.), and see generally the different exceptions to the guaranty clause of the Statute of Frauds.

(z) Reader *v.* Kingham, 13 C. B. N. S. 352.

(a) Arnold *v.* Stedman, 45 Pa. St. 188; Spann *v.* Baltzell, 1 Flor. 313; Creel *v.* Bell, 2 J. J. Marsh. 311.

(b) See Pool *v.* Sandford, 52 Tex. 637; Walker *v.* Hill, 119 Mass. 249.

(c) Taylor *v.* Savage, 12 Mass. 102.

(d) Cross *v.* Richardson, 30 Vt. 649; see as to the various exceptions the sections where they are specially treated.

(e) Andrews *v.* Smith, 2 Cr. M. & R.

631; Drake *v.* Flewellen, 33 Ala. 109; Marx *v.* Bell, 48 id. 499; Turner *v.*

Hubbell, 2 Day, 459; Downey *v.* Hinch-

man, 25 Ind. 455; Shaffer *v.* Ryan, 84 Ind. 141; Thomas *v.* Delphy, 33 Md.

379; Adams *v.* Hill, 16 Me. 218; Wallace *v.* Wortham, 25 Miss. 119; Under-

hill *v.* Gibson, 2 N. H. 358; Prentice *v.* Wilkinson, 5 Abb. Pr. N. S. 51;

Mallory *v.* Gillett, 21 N. Y. 413; Wilcox Silver Plate Co. *v.* Green, 72 N. Y.

19; Vandegrift *v.* Cassidy, 1 W. N. Cas. 319, S. C. Pa.; Mease *v.* Wagner,

1 McCord, 396, 397; Ayer *v.* Hay, 2 Constit. (So. Car.) 365; Hughes *v.*

Creyon, id. 259.

(f) Bushell *v.* Beavan, 1 Bing. N. C. 122; see Berryhill *v.* Jones, 35 Ia. 339; see § 34.

for the same duty (*g*) Where the agent of a certain shipping firm agreed to pay the plaintiff's claim if he would not take certain steps, the effect of which would be to charge the firm, and the plaintiff did not do so, and never therefore established a claim against the firm in question, the agent was liable on his promise. (*h*) Where the plaintiff paid over to the defendant certain funds upon a promise of indemnity, and these funds were recovered by a certain third person, the indemnity not being collateral to any other obligation, was not within the Statute of Frauds. (*i*) In an English case, which in some respects is not unlike *D'Wolf v. Rabaud*, will be found a curious example of an apparent guaranty having no other contract to which it is collateral, the facts were as follows: The plaintiff, Reader, a bailiff, directed to arrest for contempt one H. A., a defaulting judgment debtor, and authorized by M., the creditor, to take half the debt in satisfaction, proceeded to arrest H. A., and Kingham, a relation of H. A., promised Reader that he would either pay the debt or produce H. A. by a certain time; this agreement was held to be exclusively between Reader and Kingham; M. could not have sued upon it, and though H. A. would not have been discharged by arrest under the process in question, and his debt to M. survived: yet the promise not having been made to the creditor M. it is not a guaranty, and Reader was not M.'s agent to make such an arrangement. (*j*) To summarize this case, it may be said that H. A. owed M., and Kingham owed Reader; that H. A. did not owe Reader, nor Kingham owe M., therefore the promise of Kingham to answer to Reader for H. A. was collateral to nothing. A promise by an administrator to abide the decision of arbitrators as to a matter arising after the intestate's death or to pay costs, is one on which no one else is liable but himself, and therefore is not a guaranty. (*k*) So a promise to pay money if the promisee will

(*g*) *Turner v. Hubbell*, 2 Day, 459; see *Robinson v. Potter*, 21 Law Rep. N. S. 554 (S. C. Vt.); *Beach v. Jones*, 50 Ind. 531; see § 97.

(*h*) *Travis v. Allen*, 1 Stew. & Port. 193.

(*i*) *Stocking v. Sage*, 1 Conn. 519.

(*j*) *Reader v. Kingham*, 13 C. B. N. S. 352; 7 L. T. N. S. 789; distinguishing *Cripps v. Hartnoll*, and *Green v. Cresswell*.

(*k*) *Holderbaugh v. Turpin*, 75 Ind.

withdraw a suit for assault and battery against J.^(l) Where attorneys for both parties to a suit personally agreed that the record should be withdrawn, and made an agreement as to payment of costs, it was held that the latter attorney was liable; that he was not a surety, because his client was not bound.^(m) Where the plaintiff, a constable, had attached a horse belonging to one J., the defendant promised that if the plaintiff would let J. have the horse, he, the defendant, would stand security; that the horse should, the next day, be delivered to the plaintiff; it was held that the promise was

85. In *Baker v. Fuller*, 69 Me. 152, where the defendant's intestate had a mail contract with the United States for four years, and sub-let part of it to the plaintiffs, and died early in the period: the defendant promised the plaintiffs that if they would continue the work he would continue the same pay, the court said "it is claimed by the defendant that his promise was to pay the debt of another, and not being in writing, is within the Statute of Frauds and void. If it was to pay a debt against the estate of his intestate, it is not binding upon him. Was it to pay the debt of the estate? The contract between the plaintiffs and the defendant's intestate was for services not to be performed within a year. If it was not in writing, as the evidence tends to prove, it was within the Statute of Frauds, and could not be enforced. The plaintiffs might maintain an action against his estate for services rendered under it prior to his death, but not for services rendered after it. His death put an end to the employment. The defendant could not create a legal liability against the estate by any undertaking on his part in his capacity as administrator. There was then no debt against the estate which he represented, to which his promise was collateral. If he promised the plaintiffs, in his representa-

tive capacity, to pay them for their services if they would render them, inasmuch as he could not thereby create a legal liability against the estate, he rendered himself personally liable. We think the evidence is sufficient to authorize the jury to find a promise by the defendant in his own right to pay the plaintiffs for their services."

(*l*) *Read v. Nash*, 1 Wils. 305; *Ld. Raym.* 1083.

(*m*) *Iveson v. Conington*, 1 B. & C. 160. Where the court entered a rule that a party pay an amercement if he wishes to go on with his suit, and his solicitor promised to pay the amercement if the other solicitor would enter upon the docket that the terms of the rule had been complied with, in order that the suit might go on, it was held that the promise was original, there being under the rule no liability in the party amerced who might elect not to go on; *Sampson v. Swift*, 11 Vt. 316. Where an attorney authorized by his client to discontinue a suit against S., in which S. had been arrested, and held to bail, and in which the defendant was one of S.'s sureties, agreed with the defendant to discontinue if the latter would pay him part of the costs, it was held that the Statute of Frauds did not apply; *Morgan v. Woodruff*, 18 N. Y. Weck. Dig. 59 (N. Y. C. P.).

original, and not within the Statute of Frauds, as there was no liability in J., or any promise from him to deliver the horse.⁽ⁿ⁾ A promise to indemnify one from the consequences of committing a trespass is not within the Statute of Frauds.^(o) A promise by an attorney to charge no fee in case of failure to recover in a suit is not a guaranty within the Statute of Frauds.^(p) So, a promise to indemnify an officer for seizing property claimed by the defendant in the execution to be exempt."^(q) In a similar case the court said "the promise was an original, and not a collateral engagement. There was no element of debt, default, or miscarriage of any third person in the agreement. The act against which the indemnity was promised was for the benefit of the promissor, and involved a liability to loss on the promisee, and was not within the Statute of Frauds."^(r) Where the defendant had, or thought he had, an interest in a controversy, and promised the plaintiff, who also had an interest, that if he would carry on the suit, he, the defendant, would reimburse him half his expenses, the Statute did not apply.^(t) So a promise by the defendant to the plaintiff that if the latter, who was sued in another matter, would not settle such suit, but let his name be used as defendant, and let him, the present defendant, manage such suit, he, the latter, would indemnify him, the present plaintiff, against all liability for costs.^(u) A promise by a real party in an action to a nominal

(n) *Tindal v. Touchberry*, 3 Strobb. 178.

(o) *Allaire v. Ouland*, 2 Johns. Cas. 56.

(p) *Fitch v. Gardenier*, 2 Keyes, 516; 2 Abb. Dec. 153.

(q) *McCartney v. Shepard*, 21 Mo. 576; see *Heidenheimer v. Johnson*, 17 Alb. L. J. 114 (Ct. App. Tex.).

(r) *Mays v. Joseph*, 34 Oh. St. 24. So, where the plaintiff agreed with the defendant that if S. P. C. should go on J. C.'s land and commit a trespass, with a view of having a claim of title settled; that each should pay half of the amount and costs which J. C.

might recover against S. P. C.; it was held to be an original promise of indemnity, and not a guaranty within the Statute of Frauds, as there was no debt or default on S. P. C.'s part; *Marcy v. Crawford*, 16 Conn. 553.

(t) *Dorwin v. Smith*, 35 Vt. 75, citing cases. But a request by one supposed to be liable on a note, but not really so, to one really liable to defend the note in a suit, will give rise to no liability in the one making the request; for if it is a contract at all, it is a guaranty, and within the Statute of Frauds; *Wells v. Mann*, 52 Barb. 265.

(u) *Goodspeed v. Fuller*, 46 Me. 146.

party to indemnify him against all damages is good by parol.^(v) So where the person who had carried on the suit was an acceptor for the accommodation of the person who promised to indemnify him.^(w) Where a land-owner promised an occupier of land in the same parish to indemnify him for resisting a vicar's suit for tithes, the Statute of Frauds did not apply. The reason given was that the defendant wanted the question of the tithes settled; but it will be seen that no one else except the defendant was under any obligation to the plaintiff.^(x) Where the defendant, a lieutenant in the navy, said to the plaintiff, who furnished clothing to the men, "I will see you paid at the pay-table;" this he tried to do, but was not permitted; the sailors who had not bought the clothes were not liable, and therefore the defendant's oral promise was not within the Statute of Frauds.^(y) So a promise by a person getting up an entertainment which was to be paid for by subscriptions, to pay certain of the expenses, is valid though there were subscriptions and these were collected.^(z) Where the defendant falsely represented himself as empowered to act for a certain third party

Where one B. sued Albee and attached the debt which A. G. S. owed Albee, J. Soule & Sons, the plaintiffs, agreed to indemnify A. G. S. against B.'s suit if he, A. G. S., would pay Albee; and upon this agreement solely A. G. S. paid Albee. Later Albee made a bond and mortgage to J. Soule & Sons, the plaintiffs, as security to them for their above liability, and also to protect them in another liability to one F. B. got a judgment against A. G. S., and he, A. G. S., demanded and got repayment from J. Soule & Sons: it was held that the agreement of the latter to indemnify A. G. S. was original and not a guaranty, as under the agreement there was no liability in Albee, or any one else, except J. Soule & Sons, to repay A. G. S. The payment, therefore, was voluntary and the mortgage valid; *Soule v. Albee*, 31 Vt. 146.

(v) *Knight v. Sawin*, 6 Me. 363.

(w) *Howes v. Martin*, 1 Esp. 162.

(x) *Adams v. Dansey*, 6 Bingh. 506. So where one L. authorized the plaintiff to sue for an infringement of his, L.'s, patent, and that his pay should be part of what he should recover, L. assigned the patent and claim to the defendant, who instructed the plaintiff not to go on with the suit, and promised him \$25 for his services; this the plaintiff agreed to, and dropped the suit; under the original contract L. had owed the plaintiff nothing, and therefore the defendant's promise was not a guaranty within the Statute of Frauds; the plaintiff was to get his pay not from L., but from the proceeds of the suit; *Call v. Calef*, 4 Cushing, 390.

(y) *Keate v. Temple*, 1 B. & P. 158.

(z) *Walker v. Norton*, 29 Vt. 229.

and so that the third party having given no such authority could not be charged, the promise of the defendant to see the plaintiff paid was not a guaranty within the Statute of Frauds. The defendant may be liable in an action of deceit, but not on his contract if he was not credited.(a) So, where the defendant, a silent partner in a firm, promised the plaintiff, who was about to become a clerk of the firm, that if the latter did not pay him a certain amount, he, the defendant, would make it up.(b) In an English case which passed from the Queen's Bench into the Exchequer Chamber, and thence to the House of Lords, this question of non-liability in a third person was much discussed;(c) the facts were, that the plaintiff, who had been laying down a sewer under orders from a local health board, refused to go on with his work and lay down certain additional junction pipes, and said to the defendant, the chairman of the board, that if he or the board would give the order, he, the plaintiff, would do the work. The board refused to pay because they had given no order, and the Court of Queen's Bench entered a nonsuit because of the Statute of Frauds, the court saying that a guaranty of a debt to be incurred was as much within the Statute of Frauds as a guaranty of a debt already incurred. The Exchequer Chamber reversed this because they thought that the court had assumed that the plaintiff thought he had the order of the board, whereas the fact was that he thought he had not, and for that very reason had asked for the defendant's promise. This was affirmed in the House of Lords, their lordships, saying expressly that in order to give rise to a guaranty there must be a liability in some one answered for. A verbal promise by the president, who was also a large stockholder, of a corporation, that if the plaintiff would buy stock, he should receive fifteen per cent. within one year, is not within the guaranty clause of the Statute of Frauds, there being no debt due by any third party, as the corporation for example.(d)

(a) *Thompson v. Bond*, 1 Camp. 4. L. R. 5 Q. B. 613; 7 id. 196 (Scacc.

(b) *Douglass v. Jones*, 3 E. D. Sm. Cam.); 7 H. L. 24 (Dom. Proc.).

551.

(d) *Moorehouse v. Crangle*, 36 Oh.

(c) *Mountstephen v. Lakeman*, St. 130; see *Hill v. Smith*, 21 How.

where one P. being bound to deliver on call certain shares to the defendant, and the latter having sold his "call" to the plaintiff and guaranteed its performance, and the plaintiff having called for the shares, it was agreed between the plaintiff, the defendant, and P., that further time should be given P.; it was held that as there was no liability on the part of P. to the plaintiff (P. being liable only to the defendant), the defendant's promise was not within the Statute of Frauds.(e) A promise by an assignee for the benefit of creditors to hold the assigned property, real and personal, for the security of sureties of the assignor, is not collateral and within the Statute of Frauds, because it is a new and original undertaking; and there is no subsisting liability to which it is collateral.(f) Where the defendants, out of a fund which they controlled, undertake to pay board for their employés, and no contract (*semble*) was made with the latter by the plaintiff, the Statute of Frauds does not apply.(g) Where the defendant, a widow, before the grant of administration on the husband's estate, verbally instructed the plaintiff, to let S., a man in the employment of the estate, have out of the plaintiff's store whatever he wanted and that the estate would pay for it,

U. S. 286; see § 120. A promise that if the plaintiff will take shares in a company about to be organized, the defendant will find some one to take these shares off his hands and pay for them, is not within the Statute of Frauds; *Green v. Brookins*, 23 Mich. 52. So a promise by a defendant, whom the court regarded as identical with a certain company, to repay the plaintiff whatever advances he might make the foreman of the company: though this was rather a promise to pay one's own debt; *Gradwohl v. Harris*, 29 Cal. 155.

(e) *Hargreaves v. Parsons*, 13 M. & W. 570. An agreement that if the plaintiff would obtain the notes of a certain bank, and bring them to the defendant and give him a discount on them, he, the defendant, would cash

such bills, is not a guaranty; *Smith v. Spies*, 2 Hall Super. 480. The defendant's promise to pay the plaintiff interest on certain damages assessed in his favor against a railroad, who had taken his land, is not within the Statute of Frauds, if the arrangement is such that the railroad does not owe such interest to him, the plaintiff; *Jepherson v. Hunt*, 2 Allen, 421.

(f) *Merrill v. Englesby*, 28 Vt. 157, passing upon *Mussey v. Noyes*, and *Noyes v. Mussey*.

(g) *Chicago Co. v. Liddell*, 69 Ill. 640. A promise to pay the boarding, lodging, etc., of the plaintiff's son, though the latter was *sui juris*, is not a guaranty when the son was ill and unable to pay, and there was no suggestion that he was liable; *Patton v. Hassinger*, 69 Penn. St. 314.

the promise was original, and not within the Statute of Frauds, and was binding on the defendant personally upon proof that the goods were furnished on the faith of it, although charged in the plaintiff's books against the estate; it was not pretended that the estate was liable for the goods sold, and a promise cannot be collateral unless some one owes directly. (*h*) A promise by the citizen of a town to another citizen in time of threatened invasion that the former would pay the latter for working on the city defences is an original promise, and not within the Statute of Frauds; no one else is liable. (*i*) One Ross having received a devise of a mill-seat, upon condition of making a payment to Chapman, was about to decline the devise on the ground that one S. might erect a dam further down, which by backing would make a mill valueless, when Chapman, in consideration of the payment to him, agreed to indemnify Ross against such injury on the part of S.; whereupon Ross paid the money and built his mill, and S. built his dam, and, as Ross had feared, made the new mill valueless; it was held that Chapman was liable on his promise, notwithstanding the Statute of Frauds, inasmuch as the liability was for the lawful act of S., not a tortious one, but that Ross, the plaintiff, must show that S.'s building of the dam was lawful. Ross's recovery for an unlawful act of S. was against S. himself; S. was not liable to any one for a lawful act, hence Chapman's indemnity for such lawful act was not collateral. (*j*) The plaintiffs, the proprietors of certain canal locks, refused to let certain lumber which S. was freighting pass through unless the tolls were paid; S. thereupon procured the defendant to guarantee these tolls; this promise was held to be original, as there was no obligation in S. to pay the tolls; he was never charged with them by the plaintiffs, and not having passed

(*h*) *Ledlow v. Becton*, 36 Ala. 598.

(*i*) *Smith v. McKenna*, 53 Pa. St. 152. A pauper injured by an accident was left at the plaintiff's house; the overseer of Lowell sent word, in his official capacity, that if the pauper did not pay the plaintiff he, the defendant, would see that the plaintiff got his pay; it was held under the circum-

stances, and there being no evidence of any contract with the pauper, that the promise was original and not within the Statute of Frauds, and that it bound the town; *Blodgett v. Lowell*, 33 Vt. 176; see *Clark v. Waterman*, 7 Vt. 77; see *Rose v. O'Linn*, 10 Neb. 364; see *Ayer v. Hay*, 2 Const. (S. C.) 365.

(*j*) *Chapman v. Ross*, 12 Leigh, 572.

the lumber through the locks until the contract was made between the defendant and the plaintiffs, was never liable for them; the fact that under his contract with the plaintiffs S. was bound to pay the tolls, so that the defendant's promise was for the benefit of him, S., did not affect the relations between the plaintiffs and the defendants.(k)

§ 101. Where the person answered for is a minor, and not liable, the defendant's promise is not within the Statute of Frauds.(l) Where the next friend of an infant litigant employed a solicitor, he is liable for the fee and costs, if he was the one trusted, though the benefit of the suit was for the infant.(m) A promise by a husband to pay his wife's debt is good by parol, she being incompetent to contract.(n) So an assumption by a third person to pay the debt of a married woman, or, to be more precise, to answer for that promise, which, in a person *sui iuris*, would give rise to a legal obligation.(o) If the promise was to answer for the infant's failure to pay after he should come of age the Statute of Frauds applies.(p) It has, in some instances, been decided that the Statute of Frauds applies to all guaranties for a minor, and in a Massachusetts case it was said that the minor's debt is only voidable, he may not set up the defence of infancy; if this rule were to prevail, the guaranty of any claim to which a defence would be made would be taken out of the Statute of Frauds.(q) So it has been held

(k) *Proprietors v. Abbott*, 14 N. H. 159. The defendant in another case assigned to the plaintiff a note which he held payable by L., under an agreement that if in a suit by L. against the plaintiff the note should be sustained as a set-off, the plaintiff should account to the defendant, but that if the plaintiff should lose his suit, the defendant should pay the cost and expenses thereof; the plaintiff lost his suit with L.; it was held that the defendant's promise was not a guaranty; *Brantley v. Carter*, 26 Miss. 285.

(l) *Harris v. Huntbach*, 1 Burr. 375; *Merner v. Klein*, 17 U. C. C. P.

292; *Nelson v. Dubois*, 13 Johns. 175, citing cases; *Ellicott v. Peterson*, 4 Md. 487; *Thompson v. Dorsey*, 4 Md. Ch. 151 (the promise was by the minor's father); *Roche v. Chaplin*, 1 Bail. 420; *King v. Summitt*, 73 Ind. 314; *Evans v. Mason*, 1 Lea, 27; *Loomis v. Smith*, 17 Conn. 115 (the promise was by the guardian).

(m) *Sanborn v. Merrill*, 41 Me. 468.

(n) *Catron v. Warren*, 1 Coldw. 368.

(o) *Lanier v. Harwell*, 6 Munf. 80.

(p) *Merner v. Klein*, 17 U. C. C. P. 292.

(q) *Dexter v. Blanchard*, 11 Allen, 366.

that a promise by a father and guardian to pay a debt of the ward is a guaranty within the Statute of Frauds, even though it was to pay out of the estate of the ward; the infant's promise was voidable, not void.^(r) In the Common Pleas of New York City it was held the guaranty of an infant's promise is within the Statute of Frauds being clearly collateral.^(s)

§ 102. Where, though there has been liability on the part of the person answered for, that liability has been discharged, as under the new contract the Statute of Frauds does not apply.^(t) Thus, it has been said of a guaranty: If its effect is to discharge the original liability, then it is not a promise to pay the debt of another, but it is a promise by which the debt of another is in fact paid. All the authorities agree that such a case does not come within the Statute.^(u) Though in a Kentucky case it was thought that this rule arose from a very nice construction of the Statute.^(v) In Texas this discharge must be averred, or the complaint is demurrable.^(w) But the common law rule is less rigorous; thus, in a case in Salkeld, though a declaration stated that the defendant promised to

Where the liability of the person answered for has been discharged.

(r) *Scott v. Bryan*, 73 N. C. 584.

(s) *Clark v. Levi*, 10 N. Y. Leg. Obs. 184, distinguishing *Harris v. Huntbach*, on the ground that in that case there was no actual contract with the infant.

(t) *Puckett v. Bates*, 4 Ala. 391; *Travis v. Allen*, 1 Stew. & Port. 193; *Jolley v. Walker*, 26 Ala. 701; *Locke v. Humphries*, 60 Ala. 120; *Hughes v. Lawson*, 31 Ark. 613; *McLaren v. Hutchinson*, 22 Cal. 190; *Harris v. Young*, 40 Ga. 65; *Schoenfeld v. Brown*, 78 Ill. 489; *Krutz v. Stewart*, 59 Ind. 181; *Smith v. Coleman*, 1 Bibb, 488; *Lieber v. Levy*, 3 Metc. (Ky.) 292; *Armstrong v. Flora*, 3 T. B. Mon. 44; *Day v. Cloe*, 4 Bush. 563; *Hilton v. Dinsmore*, 21 Me. 410; *Andre v. Bodman*, 13 Md. 255; *White v. Solomonsky*, 30 Md. 590; *Walker v. Penniman*, 8 Gray, 233; *Wood v. Corcoran*,

1 Allen, 405; *Langdon v. Hughes*, 107 Mass. 274; *Yale v. Edgerton*, 14 Minn. 202; *Olive v. Lewis*, 45 Miss. 203; *Lang v. Henry*, 54 N. H. 59; *Belknap v. Bender*, 6 Th. & Cook, 613; 4 Hun, 414; *Tisdale v. Morgan*, 7 Hun, 585; *Griswold v. Griswold*, 7 Lans. 72; *Mallory v. Gillett*, 21 N. Y. 413; *Meriden Co. v. Zingsen*, 48 id. 250; *Corbett v. Cochran*, 3 Hill, S. C. 41; *Warren v. Smith*, 24 Tex. 486; *First Nat. Bank v. Kinner*, 1 Utah, 100; *Anderson v. Davis*, 4 Vt. 136; *Sinclair v. Richardson*, 12 id. 100; *Watson v. Jacobs*, 39 id. 169; *Cross v. Richardson*, 30 id. 647-8-9; *Cole v. Shurtleff*, 41 id. 315.

(u) *Cross v. Richardson*, 30 Vt. 647.

(v) *Jones v. Walker*, 13 B. Mon. 359.

(w) *Bason v. Hughart*, 2 Tex. 480.

pay B.'s debt to the plaintiff, and did not state that B. was discharged, it will be assumed after verdict for the plaintiff on the general issue of non-assumpsit, that under the promise B. was to be discharged. Otherwise the promise would have been invalid. S. C. (1 Salk. 29) shows the declaration to have been that the plaintiff agreed to accept the defendant as his debtor instead of B. (or A., as 1 Salk. puts it), the court held after verdict that this meant not merely that the plaintiff accepted the defendant as his debtor in the place of A., but that A. was discharged.(x)

§ 103. The following are a variety of examples of this doctrine: Thus, in the adjustment of liabilities arising under a change in a commercial firm the question may arise. Where one claimed in the bankruptcy of the firm that a certain debt due the claimant by her father had at the formation of the firm been assumed as a firm debt, the Statute of Frauds was held not to apply as the original liability of the father had been discharged.(y) H. & R. were indebted to Freeman for merchandise furnished the firm; Wallace, becoming a member of the firm in R.'s place, promised to pay R.'s debt to Freeman, and the latter was discharged. It was held that the Statute of Frauds did not apply.(z) Where an agent owed the plaintiff and wished to give up his place, the defendant, who wished to succeed him, promised the plaintiff that, if appointed, he would allow the latter to deduct from his, the defendant's, salary the amount of the previous agent's debt; the Statute of Frauds was held not to apply.(a) Where McC. and M., third parties, were

(x) *Roe v. Haugh*, 3 Salk. 14.

(y) *Lane (Exp.) Lendon (Re.)*; 1 DeG. 300; 10 Jur. 382; see *Lacy v. McNeile*, 4 D. & R. 7.

(z) *Wallace v. Freeman*, 25 Tex. supp. 92. Where in the beginning of a business it is agreed that two partners should retire and the defendant assume their share of losses and receive their share of profits, it was held that the retiring partners were entirely discharged, and the defendant liable originally for a partnership loss

previously incurred; *Rupp v. Teihl*, 29 Leg. Int. 245 (Cumberland Co. C. P. Pa.). Where it is mutually agreed that Duffy, one of the defendant partners, shall be charged on the partnership books with a debt due the plaintiff, and this sum was credited on the books to the plaintiff, leaving a balance due him after deducting a smaller debt he owed the firm, it was held that the Statute of Frauds did not apply; *Corbin v. McChesney*, 26 Ill. 231.

(a) *Walker v. Hill*, 5 H. & N. 419.

furnished with goods by the plaintiff, but Sands, the defendant, undertook to pay for them, and discharge Mc. and M. of any liability, and M. settled with Sands for the amount, the Statute of Frauds did not apply; M. got some of the goods, representing them to be on the defendant's credit, and the latter ratified this.(b) Where the plaintiff supplied one G., who was a sub-contractor under the defendants, and the defendants asked the plaintiff to give G. credit, and they would stop the amount due by him to the plaintiff out of the amount they, the defendants, owed him, G.; it was said that G.'s debt was extinguished, and that the Statute of Frauds did not apply.(c) Where one L. owed the plaintiff, who as deputy sheriff held certain executions, and the latter were sold by L. to the defendant, who as part of the price promised to pay L.'s debt to the plaintiff, the Statute of Frauds did not apply, because, among other reasons, L. was no longer liable to the plaintiff.(d) Where the plaintiff, having a claim against certain ship-owners, because they brought his goods shipped through them in a damaged condition, agreed not to abandon the goods or have them surveyed with a view of charging the

(b) *Watkins v. Sands*, 4 Bradw. 209. Where the appellant promised that if the appellee would enter satisfaction on a judgment which he had against the appellant's son, she, the appellant, would transfer to the appellee certain chattels, and give him a promissory note for \$100; this she gave; it was held in an action on the note that it was a valid contract, good between the parties, on good considerations, mutually, and as it was not, on the part of appellant, a promise to pay the debt of another, it was valid as to her, though not in writing. The debt of the third person, being extinguished upon a valid promise, in this case could not be enforced in the future; *Palmer v. Blain*, 55 Ind. 13.

(c) *Nelson v. Hardy*, 7 Ind. 367. Where the defendants contracted to build a road for a railroad company,

and to pay their own employés, the railroad to stop back the wages, if not paid, out of the amount due the defendants; and the latter made a similar agreement with D., a sub-contractor, reserving the right to stop back; D., failing to pay his laborers, the defendants agreed with D., to ascertain from the plaintiff the amount the laborers owed him for supplies, and agreed to, and did pay the laborers, and in their settlements with D. held back the amount of the plaintiff's claim which they, the defendants, agreed to pay the plaintiff. It was held that this arrangement discharged the laborers from their liability to the plaintiff, and that, therefore, the Statute of Frauds did not apply; *Beach v. Hungerford*, 19 Barb. 261.

(d) *Gleason v. Briggs*, 28 Vt. 139.

ship-owners, if the defendant, the agent of the latter, would pay the difference between the invoice price and what they might bring at an auction sale, the Statute of Frauds did not apply, because, for lack of a survey or abandonment, the ship-owners were not liable to the plaintiff.(e) So where the defendant receives a fund and agrees, upon the plaintiffs giving up their claim against the third person, to pay the latter's debt.(f) Where the plaintiff made a machine for S., for which D. & Co. were to pay by accepting S.'s draft; but afterwards they refused to do this, and the defendant agreed to pay the plaintiff, if he would finish the machine, by a note or an acceptance of S's paper; S. refused to take the machine or give his paper; the jury having been instructed that if the machine was not made for the defendant, or if D. & Co. or S. remained liable, their verdict must be for the defendant, the court refused to disturb a verdict for the plaintiff.(g) Where the defendants promised to pay a debt due by the building-contractor to the plaintiff, and the latter in consideration thereof extinguished the contractor's liability, the Statute of Frauds was held not to apply, the transaction being regarded as a purchase.(h) Where there was a promise by a third person to an attorney for the complainant in a divorce to pay his fee, and the proceedings were settled by agreement, it was held that there was no subsisting liability in the complainant, and the inchoate right to allowance for counsel fee was lost by the discontinuance of the suit under the agreement, and that the oral promise was good.(i) Where the plaintiffs,

(e) *Travis v. Allen*, 1 Stew. & Port. 193.

(f) *Skelton v. Brewster*, 8 Johns. 376.

(g) *Quintard v. De Wolf*, 34 Barb. 97.

(h) *Consoc. Presb. Soc. of Green's Farms v. Staples*, 23 Conn. 557; see *Packer v. Benton*, 35 Conn. 349.

(i) *Prentice v. Wilkinson*, 5 Abb. Pr. N. S. 51. Where one Mrs. C. was a debtor to the plaintiff, the debt being secured by a deed of certain real estate absolute upon its face, but actually

intended as a mortgage, Mrs. C. being desirous of paying said indebtedness, and obtaining a conveyance of the land, at the request of the defendant the plaintiff conveyed the land to Mrs. C., in consideration of which the defendant deposited and delivered in pledge to secure the indebtedness certain railroad bonds, which he agreed, within one year thereafter, to redeem at par by paying the principal and interest which they represented. The action was to foreclose the equity of redemption in the railway bonds,

having sent away for collection notes they held on which W. E. K. was liable, accepted a new note from the defendant, and gave him a receipt acknowledging the note to be in full satisfaction of W. E. K.'s debt, and gave the defendant an order in favor of W. E. K., directing their, the plaintiffs', agent to deliver up the original notes, the defendant's note is a sufficient memorandum, though it states no consideration, as required by the Statute of Frauds.(j)

§ 104. The question of discharge is usually one of fact for the jury, thus where one L. a witness swore "that he bought a gig from defendant for \$140, and the understanding was that the defendant was to be paid by Antonio. Antonio agreed to it. Antonio was in debt to him; he could not have bought the gig, but by paying for it in this way, Antonio said he would credit the amount on a note given by defendant to him in 1829;" on these facts it was for the jury to say whether L. had been discharged, and if so, the Statute of Frauds did not apply:(k) the claim was by way of set-off in a suit on the note.

The question of discharge is for the jury.

§ 105. The following are some examples in which the third party was not discharged, and the Statute of Frauds was held to apply. Thus where the plaintiff promised the defendant that if he would get an order from one S. on him, the defendant, he would accept it and pay it; the court said the conversation between the defendant and the plaintiff did not amount to a contract. S. was not a party to it, nor present; he was not discharged from his indebtedness to the plaintiff, nor the defendant from his indebtedness to him; the plaintiff so treated it, for he afterwards called on S. for the money.(l) A parol promise by

Cases where there was no discharge.

and to hold the defendant personally liable for any deficiency on their sale; recovery was allowed, as the debt of Mrs. C. was extinguished; Booth v. Eighmie, 60 N. Y. 239. lutely to pay the note and discharges the maker as against the endorsee, the Statute of Frauds does not apply; Spann v. Baltzell, 1 Flor. 313.

(j) Mead v. Keyes, 4 E. D. Sm. 512. 203. (k) Antonio v. Clissy, 3 Richards.

Where there is a new agreement between an endorser and his endorsee, by which the former undertakes abso- (l) Benson v. Walker, 5 Harring. 115; see, also, Laidlow v. Hatch, 75 Ill. 13; Hazeltime v. Page, 4 Vt. 49;

a third party to pay the defendant's debt, and an acceptance of this promise by the plaintiff (the creditor), will not without more discharge the debtor; such a promise is a mere guaranty.*(m)*

§ 106. There is some authority for a denial of the principle that a discharge under the contract of guaranty of the obligor of the contract guaranteed, will take the former contract out of the Statute of Frauds.*(n)*

The non-liability rule *semble* denied.

§ 107. An ordinary instance of the discharge of the debtor by the new agreement is a novation by which the original creditor, the original debtor, and the new promissor agree that the original debtor shall be discharged of his liability, and that the new promissor shall take his place, the consideration of the promise being the release of the one person and the substitution of the other; to this arrangement the Statute of Frauds does not apply.*(o)* The special kind of novation thus described is more properly perhaps called a delegation.*(p)* Even under the common law rule that a chose in action was not assignable, a novation was good.*(q)* Where A. owes B, and B. owes C., there must, to

Novation.

Andre v. Bodman, 13 Md. 255; *Stewart v. Campbell*, 58 Me. 443; *Langford v. Freeman*, 60 Ind. 50; *Lomax v. McKinney*, 61 id. 378.

(m) *Buchanan v. Paddleford*, 43 Vt. 64; see *Saxton v. Landis*, 1 Harrison, 304.

(n) *Tompkins v. Smith*, 3 Stew. & Port. 55; see *Jones v. Walker*, 13 B. Mon. 359; *Hoppock v. Wilson*, 1 South. 149; *Rowe v. Whittier*, 21 Me. 549.

(o) *Carpenter v. Murphree*, 49 Ala. 85; *Welch v. Kenny*, 49 Cal. 49; *Karr v. Porter*, 4 Houst. (Del.) 297; *Anderson v. Whitehead*, 55 Ga. 278; *Sapp v. Faircloth*, 28 Alb. L. J. 17 (Ga.); *Runde v. Runde*, 59 Ill. 98; *Decker v. Shaffer*, 3 Ind. 187; *Hopkins v. Carr*, 31 id. 260; *Porter v. Dearing*, 33 id. 156; *Nichols v. Glover*, 41 id. 24; *Lester v. Bowman*, 39 Ia. 614; *Lord v. Davison*, 3 Allen, 131; *Doane v. Newman*, 10 Mo. 269; *Wright v. McCully*,

67 id. 134; *Clark v. Hall*, 6 Halst. 84; *Slingerland v. Morse*, 7 Johns. 463; *Stoddard v. Graham*, 23 How. Pr. 532; *Van Epps v. McGill*, Hill & Denio (Lalor's Supp.), 109; *Styron v. Bell*, 8 Jones, 225; *Bacon v. Daniels*, 37 Oh. St. 281; *Scott v. Atchison*, 36 Tex. 78 (discussing the subject); *Williams v. Little*, 35 Vt. 324; *Waggoner v. Gray*, 2 Hen. & Mun. 603; *Cook v. Barrett*, 15 Wis. 597; *Kissock v. Woodward*, 1 U. C. K. B. 345. On the general subject of novation, see *Meister v. Birney*, 24 Mich. 438; *Edgell v. Tucker*, 40 Mo. 523; *Mather v. Butler Co.*, 28 Ia. 253; *Dever v. Akin*, 40 Ga. 423; *McRae v. Creditors*, 16 La. Ann. 306; *Hennen's La. Dig. ii. 993 et seq.*; *Hill Amer. Law*, i. 252 *et n.*; *De Gol. on Guar.* (Am. ed.) 108 n.

(p) *Stewart v. Campbell*, 58 Me. 441; *Adams v. Power*, 52 Miss. 837.

(q) *Fairlie v. Denton*, 8 B. & C. 400.

make A. liable for C.'s debt, be a promise in writing or a novation.(r) A novation will be enforced between the new party no matter what were the equities between the primary contractors.(s) It is an essential feature of a novation that the original indebtedness should be extinguished, and a new debtor substituted for the old one.(t) The third party must be completely discharged; if the plaintiff who holds such a person's note does not give it up, and merely says that the third party is discharged, it is not enough, and the Statute of Frauds applies.(u) If there is no discharge of the first debtor, not only does the Statute of Frauds apply, but the new promise has no consideration, the promisor gaining nothing, and the promisee losing nothing by the arrangement.(v) It has been said that in the substitution of a new debt or obligation for an old one, which is denominated in the civil law a novation, the intention of the effect should be positively declared, or at least in whatever manner expressed, it should be so evident as not to admit of a doubt; in other words, a novation is not to be presumed unless the intention to that effect evidently appears.(w) So in Louisiana it has been held that a delegation does not operate as a novation, unless the creditor expressly declares his intention to discharge the old debtor and accept the new one.(x) But as adopted into the common law, the rule is not so strict; it has been held that where three meet, and one is substituted as debtor in the place of another, the presumption of law is that the former debtor is discharged;(y) and that the jury can infer from the transaction that the original debtor was to be discharged even if it was not expressly stipulated.(z)

§ 108. The following are some examples of novations: Thus, where the defendant was upon the brink of a bank-

(r) *Decker v. Shaffer*, 3 Ind. 187. (v) *Jones v. Ballard*, 2 Const. (So.

(s) *Edenfield v. Canady*, 60 Ga. 456. Car.) 114.

(t) *Jaudon v. Randall*, 47 N. Y. (w) *Cockrill v. Johnson*, 28 Ark. 195.
Super. Ct. 375; *Hogsett v. Ellis*, 17 (x) *Choppin v. Gobbold*, 13 La. Ann. 238.
Mich. 362; *Benson v. Shipp*, 5 Martin

N. S. 157; *Adams v. Power*, 52 Miss. (y) *Grover v. Sims*, 5 Blackf. 502.

837. (z) *Haydon v. Christopher*, 1 J. J.

(u) *Gunnels v. Stewart*, 3 Brev. 53. Marsh. 382.

ruptcy, some of his creditors met to consider what should be done, and his effects being found only sufficient to pay 7s. 6d. in the pound, the creditors agreed to accept 10s. in the pound from W., the defendant's agent, in full satisfaction of their debts, and undertook to assign their debts to him. The only object of the deed was the assignment of the debts, and W. was to pay 10s. in the pound as the price of those debts. After this the plaintiff went out of town, and some of the creditors accepted 10s. in the pound, and assigned their debts to W. It was held that to a suit for the plaintiff's whole debt the above agreement could be orally proved as a defence, the defendant having paid in the amount for which he had bound himself under the verbal contract.(a) Where a surety, who has paid a debt, sues the principal, the original debt being discharged, the Statute of Frauds does not apply to the new one.(b) Where there is an oral promise to assume a mortgage on land, if the mortgagor is discharged, the contract is a novation, and the Statute of Frauds does not apply.(c) McC., being indebted to the plaintiff, gave him an order on the defendant for certain goods; as the defendant also had a claim against McC., it was agreed between the defendant and the plaintiff that the defendant should sell the goods, and apply the proceeds to the payment of both claims; the Statute of Frauds did not apply.(d)

(a) *Anstey v. Marden*, 1 B. & P. N. Rep. 131. A promise by A., who is debtor to B., that upon being released by B., he will pay the amount of the debt to C., is not within the Statute of Frauds; *Barringer v. Warden*, 12 Cal. 314.

(c) *Bowen v. Kurts*, 37 Ia. 241.

(b) *Madden v. Floyd*, 69 Ala. 225, citing *Brandt on Surety*; *Beal v. Brown*, 13 Allen, 114. Where a wife bought a stove, left her husband and the stove with him, and asked the plaintiff to take the stove back, promising to pay for its use; and the husband, needing the stove, agreed to pay for it, his promise is not one to answer for his wife's debt; *Palmer v. Witcherly*, 17 N. W. Rep. 364, S. C. Neb.

(d) *Clark v. Hall*, 6 Halst. 84. Where there was an agreement in the nature of a novation, the defendant verbally accepting an order on himself, drawn by one B., whose debt in the presence of the parties was marked discharged by the plaintiff, the defendant cannot resist on the ground that, in fact, he owed B. nothing; *Jones v. Ellis*, 4 Luz. Leg. Reg. 276, C. P. Luz. Co. Pa. Where the plaintiff held notes payable to B., which had been made by M., as principal, and S., who was the defendant's agent, as surety; these were

§ 109. The following are some examples of cases held not to come within the novation principle: Thus the defendant agreed verbally to pay a debt which K., a corporation, owed the plaintiff, the money the defendant paid to his own agent, and charged to the account of K. The agent did not pay over the money, as the plaintiff did not give up his claim against K., and K. did not assent to the arrangement; it was held to be a guaranty within the Statute of Frauds.^(e) A parol agreement, by which the defendant, the plaintiff, and a third person meet and agree that the plaintiff shall credit the defendant with the amount of a debt due by a third person to the defendant, and take the amount out in services by the third person. *Semble*, that as the due-bills which evidenced the third person's debt to the defendant were not delivered up to the plaintiff, and there was no affirmative promise by the third person to pay the plaintiff, the amount of the defendant's debt to the plaintiff was not to be credited with the amount of the third person's debt to the defendant.^(f) Where the defendants formed a

Cases held
not to show
a novation.

given for goods supplied M. individually. These goods were assigned M. & Co., of which firm the defendant was a dormant partner, and M. & Co. agreed to pay the note, the Statute of Frauds was held not to apply, the court saying: "Nor was it a promise to pay the debt of another, which the law required to be in writing. If the defendant was a member of the firm, the firm, in consideration of the goods, promised to become paymaster to B., and the transaction was simply in the nature of a novation, M., in consideration of his release from the original debt, giving the firm of M. & Co., as a new obligor, with B.'s assent;" *McCreary v. Van Hook*, 35 Tex. 639.

^(e) *Richardson v. Williams*, 49 Me. 558; see *Birchell v. Neaster*, 36 Ohio St. 337.

^(f) *Weeks v. Elliott*, 33 Maine, 491. "A. rented a house to B., and he underlet to C., and C. left, indebted to

B., while B. was also indebted to A. for the rent. B. sued out an attachment against C., which was placed in the hands of D., a constable. The property attached was sold by order of a justice of the peace. Before the sale, it was agreed between A., B., and C., that C. should pay to A. his debt, and A. discharged B. of his liability. D. sold the goods and received the money, and paid it to the justice of the peace previous to the judgment rendered in favor of B. A. demanded the money of D., which he refused to pay over, the money being in the hands of the justice. An attachment was sued out from another justice of the peace by other creditors of B., and the first justice of the peace was garnisheed, etc.; A. sued D., the constable; it was held that he could not recover, and that the promise, not being in writing, was within the Statute of Frauds;" *Chadwick v. Brown*, Mor. (Ia.) 492.

partnership with A. J. S., a debtor of the plaintiff; and certain banking accounts (A. J. S. being a banker and land agent) were transferred to the new firm, the latter are not liable unless they expressly assumed A. J. S.'s debts, and had him discharged. A promise by A. J. S. alone was a mere guaranty, and within the Statute of Frauds, A. J. S. remaining liable.(g) Where one, employed by T. & W., certain mill-owners, to haul timber to their mill, was promised by the defendants, for whom T. & W. were manufacturing the timber, that, if he brought orders from the latter, the orders would be paid, there was held to be no novation except as to the orders actually given.(i)

§ 110. If the original debtor is arrested and his liability thereby discharged a new engagement by the defendant to pay the debt is not collateral or within the Statute of Frauds.(j) Where the discharge of the original debtor from arrest was not an absolute one, which would have satisfied the Statute of Frauds, but was upon a condition that if the plaintiffs would discharge P. and take the acceptance of the latter, the defendant, without becoming a party to this acceptance itself, would pay if P. did not, the Statute of Frauds applies.(k) Where it was proved that by a new agreement, B., the arrested debtor, kept the debt alive, notwithstanding the arrest, the defendant's liability for B.'s debt was held to be a guaranty, and

(g) *Sternburg v Callanan*, 14 Ia. 259. Where James Chadley, the defendant, was creditor of R. C. and debtor of S., the plaintiff's assignor; S. was debtor to R. C., an arrangement to which James was not a party, and by which James was not discharged, is invalid (*semble*) by parol; the agreement being between R. C. and S. that James's debt should be carried by S. to R. C.'s account; the account was so entered, but not in language which necessarily showed James's discharge; *Cuxon v. Chadley*, 1 C. & P. 174; 3 B. & C. 591; 5 D. & R. 417.

(i) *Preston v. Young*, 46 Mich. 103.

(j) *Goodman v. Chase*, 1 B. & Ald. 303; *Butcher v. Stuart*, 11 M. & W. 873; *Maxwell v. Haynes*, 41 Me. 559. *Richardson v. Williams*, 49 id. 558; *Mallory v. Gillett*, 21 N. Y. 413; *Lathrop v. Briggs*, 8 Cow. 171; *Ranson v. Keyes*, 9 Cow. 128; *Colwell v. Harrison*, Living. Jud. Opin. 40 (Mayor's Court, N. Y.); *Cooper v. Chambers*, 4 Dev. 261; *Paethorpe v. Leshner*, 3 Rawle, 274; *Sharpe v. Speckenagle*, 3 Serg. & R. 463; *French v. Thompson*, 6 Vt. 60. (k) *Maggs v. Ames*, 4 Bingh. 470; 1 M. & P. 294; see *Marks v. Scott*, 2 Kerr, N. B. 640.

not provable under the Bankrupt Act. (6 Geo. IV. c. 16, § 51, 56.)^(l) Where the liability was discharged under bankrupt's proceedings, it was held, in an Indiana case, to be insufficient, as the court might upon cause shown vacate the discharge.^(m)

§ 111. It will have been observed in many of the cases already cited that the oral agreement was sustained because it was regarded as being not a guaranty, but a promise to pay the promissor's own debt. ^{Promise to pay the promissor's own debt.} Such an engagement is certainly not within the Statute of Frauds, though it be in form an obligation to answer for the liability of a third person.⁽ⁿ⁾ The promissor, it has been said, must have received an adequate consideration from the original debtor or creditor.^(o) The rule laid down by Serjeant Williams, and already given, to the effect that where the original debtor remains liable, and there is an absence of any liability on the part of the promissor or his property, the Statute of Frauds prevails, implies that if the promissor had^(p) been previously liable, and the new promise was to discharge such liability, the later promise might be oral. It has been said that, to render the promise valid when not in writing, it must be founded upon a consideration, and arise out of a transaction, by the terms, or by the force, of which the promissor becomes substantially the debtor of the promisee, in respect of the sum, and to the amount which he thus agrees to pay, so that making payment according to the

(l) *Lane v. Burghart*, 1 A. & Ell. N. S. 937; 1 Gale & Davison, 312. hide, 61 Mo. 433; *Robinson v. Gilman*, 43 N. H. 490; *Jenkins v. Peace*, 1

(m) *Berkshire v. Young*, 45 Ind. 467. Jones's Law, N. C. 416; *Arnold v.*

(n) *Reynolds v. Doyle*, 1 M. & G. 753; *Fitzgerald v. Dressler*, 7 C. B. N. Stedman, 45 Pa. St. 188-9; *Macey v. Childress*, 2 Tenn. Ch. (Cooper) 442-6-7-9, 454; *Dorwin v. Smith*, 35 Vt. 75.

(o) *Robinson v. Gilman*, 43 N. H. 490; *Blunt v. Boyd*, 3 Barb. 210.

(p) *Forth v. Stanton*, Will. Saund. (Sir E. V. Williams's ed.) 233, note: see *Merner v. Klein*, 17 U. C. C. P. 292; see *Allen v. Prior*, 3 A. K. Marsh. 306.

Ware v. Morgan, 67 Ala. 467; *Baker v. Cornwall*, 4 Cal. 16; *Daniel v. Mercer*, 63 Ga. 444; *Runde v. Runde*, 59 Ill. 98; *Darst v. Bates*, 95 id. 512; *Lucas v. Chamberlin*, 8 B. Mon. 276; *Smith v. Sayward*, 5 Greenl. 504; *Rowe v. Whittier*, 21 Me. 549; *Doane v. Newman*, 10 Me. 69; *Holt v. Dollar-*

terms of the promise will be a satisfaction of his own debt, or the discharge of an obligation resting upon him as a principal.(g) The distinction is fully recognized between a promise to pay one's own debt to a third person instead of paying it to his own creditor—the latter agreeing that the payment shall be so made in order to discharge his debt to such third person—and an agreement to pay the debt of another person to the creditor of such person upon some other consideration. The first was held not to be within the Statute of Frauds; but the rule is otherwise as to the latter.(r)

§ 112. Before considering the many varieties of this kind of promise, it may be well to note a few cases in which it has been held that the promise was not one to pay the promisor's own debt, and was therefore within the Statute of Frauds. Thus a promise to pay a debt to be transferred from the promisor's account to that of one B.(s) And in an analogous case, even though the defendant has become partner with the person answered for.(t) And where a note, executed by the plaintiff and defendant, was given for land bought by the latter, who afterwards agreed to give up the land to the former, if he, the plaintiff, would pay the note and hold the defendant indemnified.(u) There is a dictum in a Massachusetts case to the effect that a promise to guarantee notes which are to be paid as the price of land bought by the guarantor is within the Statute of Frauds, but *quære*.(v) That the guarantor owned a hotel, and the third party was his lessee, is not enough to make the obligation of the latter the own debt of the former, so as to take a guaranty thereof out of the Statute of Frauds.(w) Where one T. employed the defendant, and had agreed to board him, but afterwards agreed with the plaintiff that the latter should board him and his men, it was said in

(g) *State Bank v. Metler*, 2 Bosw. 398.

(r) *Blunt v. Boyd*, 3 Barb. 210.

(s) *Brunton v. Dullens*, 1 F. & F. 451. See as to promises of this class within the Statute of Frauds, *Styron v. Bell*, 8 Jones, 225.

(t) *Sternburg v. Callanan*, 14 Ia. 259.

(u) *Bumford v. Purcell*, 4 Green, (Iowa) 490.

(v) *Root v. Burt*, 118 Mass. 523.

(w) *Langdon v. Richardson*, 58 Iowa, 610.

a New York case that the Statute applied to a promise by the defendant to pay if T. did not.(x) A subsequent oral promise to pay a debt will not make the promissor liable if the original agreement was a guaranty within the Statute of Frauds.(y) A promise to pay one's own debt occurs in many shapes, which makes a division of the cases into categories or heads manifestly convenient; the difference in principle in the following classes is, however, really slight and sometimes non-existent.

§ 113. The transaction by which the principal liability comes to rest on the guarantor has been occasionally regarded as a purchase by the defendant of the plaintiff's claim against the third person.(z) Thus where W. E. K., brother to the defendant, owed the plaintiffs on certain promissory notes which they had sent away for collection; the defendant gave the plaintiffs new promissory notes, and gave him a receipt acknowledging the notes to be in full satisfaction of the indebtedness of W. E. K., and gave at the same time an order to the defendant in favor of W. E. K., directing their agent to deliver the original notes, the court held that the Statute of Frauds did not apply, as the defendant had bought the plaintiffs' claim against W. E. K., and had given them the notes therefor.(a) Where one C. made his note to the defendant, and the latter who wished to establish a set-off, said that the plaintiff had promised to pay C.'s note, and that relying upon the plaintiff's promise, he, the defendant, took it; the court inferred that the plaintiff owed C., and took this means of paying his debt, and that *non constat*, that C. owed the defendant, as the latter may merely have bought C.'s claim against the plaintiff; the plaintiff's objection of the Statute of Frauds was therefore overruled.(b) Where the creditors of the defendant, a bankrupt, agreed to accept a composition and

Purchase
theory.

(x) *Rawson v. Springsteen*, 2 Th. & C. 417, citing *Brown v. Weber*, 38 N. Y. 189. theory is discussed, and regarded as not sound.

(y) *Allen v. Scarff*, 1 Hilt. 212.

(z) See *Law Mag. & Rev.*, vol. xxxii., 3d ser. 98; in which the purchase

(a) *Mead v. Keyes*, 4 E. D. Sm. 512, the notes were not a sufficient compliance with the Statute, because *semble* the consideration was not expressed.

(b) *Lemmon v. Box*, 20 Tex. 332.

discharge their claim, in consideration that W., the defendant's agent, should pay them 10s. in the pound in full satisfaction of their claims, which they were to assign W.; it was held that the defendant having complied with his agreement could prove it by oral evidence in defence to a suit for the entire debt.(c) And so, where the defendant, who has bought a claim agrees to pay for it, the Statute of Frauds does not apply; the plaintiff had released the original debtors from any liability to herself.(d) It has been said, that where the contract is such as to substantially transfer the debt to the promissor, the rule of a new consideration, moving to the latter, applies, and the oral guaranty is valid.(e) In these cases it will be noted that the original debt to the plaintiff was extinguished, and for that reason alone the Statute of Frauds would not have applied, and where this extinguishment does not take place the Statute does apply. Thus, a promise to the plaintiff, that if he would go on with certain contract-work, the defendant would pay him a certain sum for his claim, and get it out of the person for whom the plaintiff was doing the work, was thought to be a guaranty, and without consideration. If not a guaranty it was the purchase of a chose in action, and so within the Statute of Frauds of New York.(f) The purchase theory, though strenuously pressed in a decision in the Exchequer Chamber, and on a state of facts which would have sustained it, if it were ever sustainable, was regarded as a mere cloak to cover a plain guaranty; the case was as follows: The defendants who held in pledge the rights of C. & Co., under a contract to build a bridge, having advanced money to C. & Co., to induce the plaintiff to furnish the latter with materials to finish the bridge, and in consideration of a three per cent. discount, agreed to cash a bill drawn by the plaintiff on C. & Co., and endorsed by the plaintiff; one such bill the defendants paid, but on being tendered a later bill in the same shape, and being asked for a payment of 97 per cent. of the amount, re-

(c) *Anstey v. Marden*, 1 B. & P. N. Rep. 131.

(e) *Cross v. Richardson*, 30 Vt. 648.

(f) *Talmadge v. Spofford*, 41 N. Y.,

(d) *Lord v. Davison*, 3 Allen, 131; Super. Ct., 431.

see *Lacy v. M'Neile*, 4 D. & R. 7.

fused to take the one or give the other, and the defence of the Statute of Frauds was upheld.(g)

§ 114. A distinction has been made to the effect that where the original debtor promises the assignee of the claim to pay it, the Statute of Frauds does not apply, though the assignor had guaranteed it; this was called a purchase(h) of the debt, but a promise by the original debtor to pay his own debt to whomsoever made, is different from a promise made by one not previously indebted; in neither case has the purchase feature any effect. So in another case such a transaction has been called the assignment of a fund, when the defendant has money in his hands ready to pay his contractor who gave an order on the defendant to the plaintiff, an employé of his, the contractor; the defendant having promised to pay the plaintiff is liable notwithstanding the Statute of Frauds(i) It may be said broadly that a promise by a debtor to pay the debt to the assignee of the creditor is not within the Statute of Frauds, being a promise to pay one's own debt;(j) especially when the creditor had been a debtor to the assignee and was discharged, and the obligor of the assigned agreement substituted for him.(k) So where upon the joint application of one C. and the defendant to the plaintiff for lumber, and on the plaintiff's refusal to deliver it upon the credit of C., the defendant stated that he owed C. money enough, and if the plaintiff would deliver the lumber and procure C.'s order, which would serve as a voucher to him for making the payment, he would pay the money to the plaintiff. This was a promise by a debtor to pay money

(g) *Mallett v. Bateman*, 16 C. B. N. 27 Wis. 189; and see cases in the next S. 543; 10 Jur. N. S. 365; 10 L. T. N. note. S. 869.

(h) *Mount Olivet Cemetery Co. v. Shubert*, 2 Head, 120; see *Rider v. Riely*, 2 Md. Ch. 16; 22 Md. 540. (j) *Indiana Man. Co. v. Porter*, 75 Ind. 429; *Putney v. Farnham*, 27 Wis. 189; *Beardslee v. Morgner*, 4 Mo. App. 142; see, also, *Curle v. Ins. Co.*, 12 Mo. 580; *Creel v. Bell*, 2 J. J. Marsh., 311.

(i) *Andrews v. Smith*, 2 Cr. M. & R. 631; see *Nelson v. Hardy*, 7 Ind. 367; as to assent of the debtor to the assignment, see, also, *Rider v. Riely*, just cited, and *Putney v. Farnham*, (La.).

(k) *Carpenter v. Murphree*, 49 Ala. 85; See *Decuir v. Ferrier*, 1 McGill. 207 (La.).

which he owed a creditor of his creditor, with the assent of the latter and in discharge of his own pre-existing liability. It was not a mere promise to pay the debt of a third person, but a promise to pay his own debt; the transaction was in the nature of a transfer of the claim held by C. against the defendant from C. to the plaintiff upon a consideration entirely sufficient.(l)

§ 115. A common example of this class of apparent guaranties is where the purchaser of property agrees in payment of its price to discharge a debt due by the seller. This category does not in principle differ much from promises in consideration of a fund.(m) The subject matter of the sale may be realty.(n) Or personalty.(o) So a promise to pay taxes as part of price of land.(p) A deed to the defendants in consideration of their paying the vendor's debts is not

The guaranty really the payment of price of property bought by guarantor.

(l) *Phillips v. Gray*, 3 E. D. Sm. 69.

(m) *Grant v. Pendery*, 15 Kan. 236;
Clopper v. Poland, 12 Nebraska, 69;
Fullam v. Adams, 37 Vt. 391.

(n) *Lucas v. Payne*, 7 Cal. 96;
McLaren v. Hutchinson, 22 id. 190;
Ford v. Finney, 35 Ga. 260; *Brashear v. Moran*, 1 Kent, L. Reporter, 417 (S. C. Ky.); *Hardy v. Blazer*, 29 Ind. 227;
Carter v. Zemblin, 68 id. 439; *Chamberlin v. Ingalls*, 38 Ia. 300; *Morrison v. Hogue*, 49 Iowa, 574; *Perkins v. Hitchcock*, 49 Me. 474; *Wagner v. Egleston*, 49 Mich. 222; *Lee v. Newman*, 55 Miss. 373; *Britton v. Angier*, 48 N. H. 422; *Berry v. Doremus*, 30 N. J. Law, 402; *Gold v. Phillips*, 10 Johns. 414; *Whitbeck v. Whitbeck*, 9 Cow. 269; *Seaman v. Hasbrouck*, 35 Barb. 153; *Bethel v. Woodworth*, 11 Oh. St. 395; *Cushman v. Garrison*, 2 Cinc. 147; *Miller v. Turnbach*, 7 Luz. Leg. Reg. 5 (C. P. Luz. Co. Pa.); *Story v. Menzies*, 3 Pinn. (Wis.) 330; *Hoile v. Bailey*, 17 N. W. Rep. 322, S. C. Wis., citing *Young v. French*, 35 Wis. 116; *Putney v. Farnham*, id.

187; and denying a dictum of Dixon, C. J., in *Dyer v. Gibson*, 16 id. 557; *McCarthy v. Oliver*, 14 U. C. C. P. 292.

(o) *Cameron v. Clarke*, 11 Ala. 263; *Mason v. Hall*, 30 Ala. 601; *Rabberman v. Wiskamp*, 54 Ill. 179; *Wilson v. Bevans*, 58 id. 234; *Johnson v. Knapp*, 36 Ia. 617; *Morrison v. Hogue*, 49 Iowa 574; *Griffin v. Derby*, 5 Greenl. 476; *Brown v. Attwood*, 7 Me. 360; *Todd v. Tobey*, 29 id. 222; *Calkins v. Chandler*, 36 Mich. 321; *New York, etc. R. R. v. Gilchrist*, 16 How. Pr. 564; *Cox v. Weller*, 6 Th. & C. 310; 3 Hun, 612; *Cailleux v. Hall*, 1 E. D. Sm. 6; *State Bank v. Mettler*, 2 Bosw. 397; *Quintard v. De Wolf*, 34 Barb. 97; see *Sanders v. Gillespie*, 59 N. Y. 250; *Clymer v. De Young*, 54 Pa. St. 119; *Gleason v. Briggs*, 28 Vt. 139; *Cotterill v. Stevens*, 10 Wis. 423; *Fergusson v. Kerr*, 5 U. C. Q. B. 261; *Dollard v. Potts*, 6 All. N. B. 447.

(p) *Preble v. Baldwin*, 6 Cush. 549; *Brackett v. Evans*, 1 id. 79.

within the Statute of Frauds; the promise is not a guaranty, but to pay the guarantor's own debt; and the liability is not confined to the amount of the consideration for the land.^(q) A common example is the purchase of a partnership or business interest or a stock of goods or the like.^(r) Where the plaintiff who had bought a horse from H., for which he was to give his note for \$300, resold the horse to the defendant for \$250, who took the note to H. and got the horse; H. endorsed the note which was to his order, and had it discounted, and the defendant and H. negotiated without result for a rescission of the sale as between themselves; it was held that the defendant's promise was not a guaranty within the Statute of Frauds, and that he was liable.^(s) Where B. & R. sold to the defendant the exclusive right to sell certain scales in a particular locality and took his notes therefor, and at the same time transferred to him a contract under which E. and others were bound to make the scales for them, B. & R. B. & R. also verbally guaranteed to the defendant that E. and others would furnish the scales under the contract. B. & R. transferred the notes to the plaintiffs who had notice however. It was held that a breach of the verbal guaranty was a good defence in a suit upon the notes. The Statute of Frauds did not apply, the guaranty being in substance one to answer for the guarantor's own obligation.^(t)

§ 116. In a North Carolina case, however, it was said that a promise whereby a purchaser of property of a testator agrees

(q) *Kingsbury v. Earle*, 14 N. Y. Week. Dig. 386, N. Y. S. C.

(r) *Lee v. Fontaine*, 10 Ala. 764; *Bracken v. Dillon*, 64 Ga. 251; *Eddy v. Roberts*, 17 Ill. 505; *Haggerty v. Johnston*, 48 Ind. 43; *Vanners v. Dubois*, 64 id. 338; *Rhodes v. Matthews*, 67 id. 131; *Todd v. Tobey*, 29 Me. 222; *Lord v. Davison*, 3 Allen, 131; *Bonebright v. Pease*, 3 Mich. 321; *Schindler v. Ewell*, 45 How. Pr. 34; *Shaver v. Adams*, 10 Ired. 14; *Townsend v. Long*, 77 Pa. St. 146; *Wynn v. Wood*, 10 W. N. Cas. 346 (S. C. Pa.).

(s) *Ball v. Eastburn*, 3 Houst. 403.

(t) *Wilson v. Hentges*, 29 Minn. 103.

So where L. & Co., being indebted to the plaintiff, assigned to the defendant a contract they had with a certain railroad, and that in consideration thereof the defendant guaranteed to L. & Co. the performance of the contract, and agreed with L. & Co. to pay the latter, to the plaintiff, the Statute of Frauds does not apply, and the plaintiff may sue; *Laws v. Scales*, 1 Cinc. Law Bull. 314, Super. Ct. Cincin.

to pay certain debts of the latter is within the Statute of Frauds; and that even if it were not it could not in absence of a novation be sued upon by a creditor of the testator.(u) And as to the right to sue the Connecticut rule is the same way.(v) But the weight is clearly however in favor of the right of the creditor to sue when the promissor has funds of the debtor in his hands or owes the latter under an obligation which by the guaranty he proposes to discharge (see § 42).(w) And the rule is the same even in Pennsylvania, where it is held that an oral promise made by the guarantor to the person answered for cannot be sued on by the latter's creditor.(x)

§ 117. An important and somewhat difficult question in this connection is to ascertain what is the promissor's own debt. The "leading purpose" rule, and that of the "new consideration moving to the promissor" already so fully considered, raise doubts of a similar kind.(y)

§ 118. The point of most significance is the relation which the guarantor has borne to the person guaranteed. Thus where the latter is the agent of the former, the promise as a rule is original, and is valid by parol. Where money paid to a third party is sought to be recovered as money paid to the defendant's use, it is not necessary that the evidence should be in writing; if the money was paid to the defendant's use he is liable whether the promise is proved by parol or writing; if not paid to his use but to that of the third person he would not be liable even though there was a writing.(z) Where the plaintiff, an agent of ship-owners, paid

(u) *Styron v. Bell*, 8 Jones, 225.(x) *Townsend v. Long*, 77 Pa. St.(v) *Clapp v. Lawton*, 31 Conn. 100. 146.

(w) *Mathers v. Carter*, 7 Bradw. 226; *Haggerty v. Johnston*, 48 Ind. 43; *Hardy v. Blazer*, 29 Ind. 227; *Rhodes v. Matthews*, 67 id. 131; *Seaman v. Hasbrouck*, 35 Barb. 153; see *Gold v. Phillips*, 10 Johns. 414; *Ford v. Finney*, 35 Ga. 260; *Laws v. Scales*, 1 Cinc. Law Bull. 314, Super. Ct. Cinc.; *Lee v. Newman*, 55 Miss. 373.

(y) See *Hopkinson v. Davis*, 5 Phila. 147.

(z) *Thurston v. James*, 6 R. I. 111. So where G. & Co. had imported for the defendant various articles, which articles they had bought of the plaintiffs. The plaintiffs had charged G. & Co. with the goods, and G. & Co. had charged the defendant. Afterwards,

over to them under a promise of indemnity funds claimed, and ultimately recovered at law from the agent by certain freighters of the ship, the promise of indemnity was held not to be a guaranty. (a) The Statute of Frauds does not apply where the plaintiff, as accommodation acceptor having defended an action, sought to recover the amount paid and costs from the defendant, for whose benefit she had accepted, and at whose direction she defended the first suit. (b) A promise by the defendants whom the court regarded as identical with a certain company to repay the plaintiff whatever advances he might make the foreman of the company, is not within the Statute as a guaranty. (c) Where the defendant told the plaintiff, a bank, that T. L. & Co. were to receive shipments from him, and that if his, the plaintiff's, agent R., who was to attend to the business, drew drafts upon it, it was to pay to them. R. drew a draft upon T. L. & Co., which the bank cashed, but which T. L. & Co. dishonored. The court held that the defendant was bound to reimburse the bank, the debt being his through R. his agent. (d) The plaintiff buying stock in his own name for a principal, the defendant, and holding it subject to the latter's direction, can charge the latter with any loss on the transaction, and the Statute of Frauds does not apply; *secus*, if the broker had acted as a principal, and as such contracted with the defendant. (e) Where the plaintiff became

G. by a cross entry in his books, made the defendant debtor to the plaintiffs, instead of to himself; and at no great distance of time failed. The plaintiffs applied to defendant for payment, showing him the cross entry in G.'s books, etc. The defendant acknowledged the justness of the demand, and promised to pay the plaintiffs the amount. It was held that this was not a promise to pay the debt of another within the Statute of Frauds, but viewed in the most favorable light for the defendant, was a promise to pay his own debt to another than the person to whom it was originally due, with the consent of all parties, and that defendant was bound by his promise.

Perman v. Inglis, 1 Rice Dig. (So. Car.) 360.

(a) *Stocking v. Sage*, 1 Conn. 519.

(b) *Howes v. Martin*, 1 Esp. 162; see *Knight v. Sawin*, 6 Me. 363. So, where a sheriff, who had only a technical interest in a suit, carried it on on behalf of an execution-creditor, who was the real party in interest, a promise by the latter to the former to bear the charges of the suit is not within the Statute of Frauds; *Noel v. Hart*, 5 C. & P. 230; see *supra*, § 113.

(c) *Gradwahl v. Harris*, 29 Cal. 155.

(d) *Kohn v. Nat. Bank*, 15 Kan. 434.

(e) *Genin v. Isaacson*, 6 N. Y. Leg. Obs. 215.

surety for one D. S. on a note for price of land which the defendants had bought, and the title to which they took in the name of D. S., an oral promise by the defendant to indemnify the plaintiff as to his suretyship is valid.(f)

§ 119. The connection between the guarantor and the person answered for may be an official one, and yet sufficiently close to make the obligation guaranteed the promissor's own debt. Thus, where the plaintiff lent a corporation certain stock wherewith to raise money, and the president and other directors of the corporation guaranteed the fulfilment of the contract, and promised to return the stock, the contract was said to be original.(g) Where the promissors represented themselves to be owners of, and personally liable for, certain bank-notes, they are liable to one who took the notes in reliance upon their representation.(h) Where the O. & P. R. R. agreed by writing to pay the plaintiff an annuity in lieu of other damages for their negligence in causing her husband's

(f) *Smith v. Sayward*, 5 Greenl. 504. Where the vendees of land attempted, upon failure of the title, to hold the agent of the vendors liable for the price paid, the Statute of Frauds was held to apply under the following circumstances, and the court said: "The report states that the defendant (Little) when the deed was delivered, inasmuch as the plaintiff's agent expressed fears as to the validity of the title of the Pejepscot proprietors, 'promised that if the deed did not have the effect to pass and secure the said land to the plaintiff, he would make it good;' and that the plaintiff, relying on this assurance and promise, was induced to pay his money. The meaning of the expression, "he would make it good," could not have been that he would make that deed good, nor the land good; but that if that deed was not sufficient to convey the title to the land, he would "make it good;" that is, that the title should

be perfected and legally conveyed; for it must be remembered at that time no doubt existed on the part of Little, or the proprietors, as to the soundness of the proprietary title. It seems to the court that such is the legal import of Little's promise, but if it be considered as extending further, and amounting to a promise to indemnify the plaintiff by way of damages for the loss of the title, we apprehend the legal ground will not be changed. Considering the promise in either point of view, it is within the Statute of Frauds; it is either a contract respecting real estate and the conveyance of the same, and then it is void, or else it is a promise to pay the debt or answer for the default of another, and then also it is void; *Bishop v. Little*, 5 Greenl. 366.

(g) *Simons v. Steele*, 36 N. H. 82; see *Spooner v. Dunn*, 7 Ind. 81.

(h) *Tarbell v. Stephens*, 7 Ia. 166, *sed quere*.

death, and the Pittsburgh, etc., Railroad bought the O. & P. R. R., and were authorized by act of assembly to assume the debts of the latter, and afterwards were reorganized as the Pittsburgh, etc., Railway, under a foreclosure of the mortgage against the Pittsburgh, etc., Railroad, and paid both as *railroad* and *railway* the annuity as it accrued, it was held that there was evidence for a jury that the railway promised to pay the annuity, and the Statute of Frauds did not apply.(i) In a case not affected by the Statute of Frauds, an obligation in which the directors of a bank acknowledged that they had made a mistake in lending the bank's funds, and that they considered the debt their own, shows an original indebtedness, not a guaranty.(j) The promise of an overseer of the poor to pay for medical attendance furnished a pauper is not within the Statute of Frauds; but here no one else was liable.(k)

§ 120. In most instances, however, where the connection between the parties is only official, the promise by one to answer for the other is a mere guaranty. Thus a contract of reinsurance has been held an ordinary guaranty, and not provable by parol. The reinsuring company issued no policy, and took up the policies of the first company to assist in liquidating its affairs.(l) So a promise by a stockholder and officer to pay for goods furnished to a corporation.(m) A promise by a corporation to pay a debt due by a partnership with the same name, and who transacted the same business, and had the same agent, is a guaranty, and invalid by parol.(n) A note given by a member of a vestry for the debt of a church is a mere guaranty.(o) A contract by the president of a company to pay the plaintiff's claim contracted with third parties prior to the incorporation of the company is a guaranty within the Statute of Frauds.(p)

Cases of application of the Statute even where guarantor was officially connected with person answered for.

(i) Pittsburgh, etc., R. W. v. Stokes, 4 W. N. C. 552.

(j) Bank of Tennessee v. Barksdale, 5 Sneed, 76.

(k) Lyde v. Higgins, 1 Smith (Eng.), 305.

(l) Ellis v. Fireman's Ins. Co., 27 La. Ann. 369.

(m) Searight v. Payne, 2 Tenn. Ch. 178; see Trustees of Andover v. Flint, 13 Metc. (Mass.) 543.

(n) Georgia Co. v. Castleberry, 43 Ga. 189.

(o) Rogers v. Waters, 2 Gill & J. 70.

(p) Little Rock, etc., R. R. v. Perry, 37 Ark. 178, 194.

Where a school district board lent money to Bailey, the defendant, and Gibson, another defendant, and his co-trustee of the district, verbally acknowledged a joint liability with Bailey for the repayment of the sum, and it did not appear that Gibson got any of the money, it was held that his verbal acknowledgment was a guaranty within the Statute of Frauds.(q) A personal guaranty of the president of a bank cannot be orally shown to be a guaranty by the bank, both on the Statute of Frauds and because oral evidence is not admissible to contradict a writing.(r)

§ 121. In the affairs of a partnership the relation may be so intimate as to make what would otherwise be a guaranty an original promise. Thus where a creditor of one partner on a note bought goods of the firm, an agreement in which all joined that the price of the goods should be credited on the note, is not within the Statute of Frauds.(s) Where a travelling partner is authorized by the firm to obtain money by drawing on D. C. & Sons, it is not a guaranty, but an original debt of the firm, who are bound to reimburse D. C. & Sons.(t) In a Louisiana case, where one Arick was sought to be held, parol evidence was introduced to show that, in the first place, the due bill was given for a purchase made by the partnership with the know-

(q) *Bailey v. Trustees School District*, 14 Mo. 499.

(r) *National Bank of Sturgis v. Bennett*, 33 Mich. 524. See § 100.

In *Little Rock, etc., R. R. v. Perry*, 37 Ark. 178, the following instruction was requested: "That if the jury believe from the evidence that the defendant company, by its president or other officer, did verbally agree to pay the plaintiff's claim contracted with other parties prior to the incorporation of said company, such verbal agreement or promise is void by the Statute of Frauds, as an undertaking to pay the debt of a third person, and the jury must find accordingly."

The court, speaking of the above

instruction numbered as the seventh, said: "The seventh would have been misleading, perhaps, although literally correct, as an abstract proposition. Under the circumstances, it might have diverted the attention of the jury from the possible implied contract by conduct, and by the use of the benefits of a contract. The refusal was not error. It would have been better, however, to have qualified it by the insertion of 'if there had been no other sufficient evidence of an implied or express promise,' or words to that effect."

(s) *Rhodes v. McKean*, 55 Ia. 548.

(t) *Van Reimsdyk v. Kane*, 1 Gallis. 638.

ledge of Arick, and for the advantage of his firm; and, secondly, that he promised, as commercial partner, to pay the debt. Such a promise can hardly be called a promise to pay the debt of a third person, and the above was held provable by parol, and not a guaranty.(u) A promise by a partner to pay his copartner's debt, on consideration of forbearance of execution on a judgment against the latter, is not a guaranty within the Statute of Frauds, but a promise to pay one's own debt.(v) So it has been held that a promise to pay a debt due by a firm to which the promissor belonged is not within the Statute of Frauds.(w) So the Statute has been held not to apply to a promise made by the defendant's copartner in the partnership name to pay a partnership debt, though part of the debt was that of a former firm of which the defendant was not a member, but to which the existing firm was the successor.(x) On the other hand, there are several instances of promises of this general character being held to come within the Statute of Frauds. Thus, in Louisiana, a new firm is not liable on a verbal promise to pay debts of the old firm. *Semble* the change was in adding a new partner to the old firm.(y) Nor for a note given by the former firm for the rent of a store, though the new firm used the store.(z) An oral promise by one of a firm to pay a partnership note which another of the firm had given for his private debt is within the Statute of Frauds.(a) Where the creditor of a firm took the individual note of one of the partners in satisfaction, a subsequent promise by the other partner to pay the note is a guaranty within the Statute of Frauds.(b)

§ 122. A promise by a wife or husband to answer for the debt of the other is a guaranty within the Statute of Frauds.(c) A promise by a husband before ^{Husband and wife.}

(u) Succession of Arick, 22 La. Ann. 503.

(v) Rice v. Barry, 2 Cr. C. C. 447.

(w) Files v. McLeod, 14 Ala. 611.

(x) Wilson v. Dosier, 58 Ga. 602.

(y) Paradise v. Gerson, 32 La. Ann. 534.

(z) Silliman v. Short, 26 La. Ann. 512.

(a) Taylor v. Hillyer, 3 Blackf. 433.

(b) Greenleaf v. Burbank, 13 N. H. 458; see Davis v. Caverly, 120 Mass. 415.

(c) Eastwood v. Kenyon, 11 A. & Ell. 438; Beasten v. Hendrickson, 44 Md. 616; Connerat v. Goldsmith, 6 Ga. 20; Thwaites v. Curl, 6 B. Mon. 472; Rolins v. Crocker, 62 Me. 245; Grover v. Buck, 34 Mich. 522.

marriage to pay the debt of the intended wife is a guaranty within the Statute of Frauds if the wife is not discharged, and a renewal of the promise after marriage creates no new liability.(d) An oral promise by a husband to pay for land conveyed to his wife is within the Statute of Frauds.(e) The promise is equally a guaranty though the person answered for is dead.(f) Where the plaintiff had a claim against a man, a promise by the latter's widow in consideration of forbearance to pay the claim is within the Statute of Frauds, where there was no property of the husband liable to pay the debt, the whole being assigned to the widow in satisfaction of her rights.(g) A direction by a man to his wife to sign a note in her own name, a refusal by him to execute the note himself, and a promise by him to see it paid constitute a case of ordinary guaranty to which the Statute of Frauds applies.(h) Where a husband bought goods which were for the benefit of the wife's separate estate, a subsequent promise to pay is a mere guaranty within the Statute of Frauds if the husband bought for himself and not as her agent; if he had acted as her agent, her parol ratification would have been good.(i) It has, however, been said that a promise by a wife to charge her separate estate with the amount of a sum dishonestly spent by her husband as agent for the plaintiff is not a guaranty.(j) Where lumber was furnished to a contractor to be put into a certain house and was charged to him, it was held that though the property was that of the defendant's wife, yet the lumber having been used, and the defendant with his wife and family enjoying the house, he was liable on his subsequent promise to pay for the lumber, notwithstanding the

(d) *Cole v. Shurtleff*, 41 Vt. 315.

(e) *Bagley v. Sasser*, 2 Jones's Eq. 351.

(f) *Waul v. Kirkman*, 27 Miss. 825; *Pfeiffer v. Adler*, 37 N. Y. 164; *Lennox v. Eldred*, 65 Barb. 412; *Bostwick v. Eldred*, 8 Alb. L. J. 221; *Hoeflinger v. Stafford*, 38 Wis. 344.

(g) *Durant v. Allen*, 48 Vt. 60. A verbal promise by a wife to pay a sum due on the joint bond of her husband

and herself, though made after his death, and though she was administratrix, does not bind her personally, being by parol and for the debt of another, the bond as to her being void; *Guishaber v. Hairman*, 2 Bush, 321.

(h) *Miller v. Long*, 45 Penn. St. 352.

(i) *Travis v. Scriba*, 12 Hun, 393.

(j) *Whitmore v. Farley*, 28 W. R. 910.

Statute of Frauds.(k) The promise by a reputed father to pay for the board of his illegitimate child has been considered a guaranty, the mother having in the first instance contracted to pay such board.(l) Where a tax collector had lost his list and could not tell who had paid him and who not, and his father at a town meeting promised orally to pay up any deficiency in the tax bills, if the town authorities would give a list and would pay the expenses of litigation connected therewith, this was held to be a mere guaranty and within the Statute of Frauds.(m)

§ 123. Where the defendant, already liable with the person answered for, undertakes to fulfil the latter's liability, the Statute of Frauds does not apply.(n) Where the plaintiff had a former action against the defendant and two others, and the defendant promised that if that suit were discontinued he would pay, the Statute of Frauds does not apply.(o) Where the defendant, one of several trustees and executors, renounced probate and disclaimed, it was, nevertheless, held that the defendant's show of liability for the acts of his co-trustees, etc., was enough to make a promise by him to pay a certain sum in settlement of claims against the estate original and binding.(p)

A promise by a guarantor already liable.

§ 124. This distinction is an important one in its bearing upon the vexed question of the validity of an oral indemnity to one for becoming a guarantor; many of the authorities cited to show that such an indemnity is not within the Statute of Frauds(q)

Indemnity for becoming a guarantor.

(k) *Carey v. Albert*, 2 Pears. 300. 46 Mo. 399; *Perkins v. Goodman*, 21 In De Golyar on Guaranty (Am. ed.), Barb. 220; *Morgan v. Woodruff*, 18 N. 102 *et seq.*, it was said that if a married woman has bound her husband by a promise, a guaranty of that promise is within the Statute of Frauds, but *secus secus* inasmuch as she cannot bind herself.

(l) *Haynes v. Nice*, 100 Mass. 327.

(m) *Pratt's Appeal*, 41 Conn. 192.

(n) *Batson v. King*, 4 H. & N. 739; *Lang v. Nevill*, 6 Jur. 217; *Horn v. Bray*, 51 Ind. 560; *Garner v. Hudgins*,

(o) *Stevens v. Squire*, Comb. 362; S. C. S. N. *Stephens*, 5 Mod. 205; see *Blount v. Hawkins*, 19 Ala. 100.

(p) *Orrell v. Coppuck*, 26 L. J. Ch. 269.

(q) See § 144.

are cases in which the indemnitor being previously liable for the obligation guaranteed, has only promised to pay his own debt in giving the indemnity. Thus in the leading English case, the defendant promised to indemnify the plaintiff against all loss, if he, *with the defendant* and W. C., would go on a bond to save one N. D. M. harmless from the payment of debts due by W. C. and N. D. M.^(r) Of such instances as these, it has been well said "that these are cases where the defendant, being already bound as surety, or otherwise, induces the plaintiff to go upon the bond by a promise to indemnify him; but these decisions may be safely rested on the well-established doctrine that a surety may by parol limit the extent of his liability as between him and other parties to the paper."^(s) So in an Irish chancery case, it has been held that where one surety paid the debt and sued for contribution his right was only an equity, and could be rebutted by proof that the defendant only became surety under promise of indemnity from the plaintiff.^(t) A parol agreement by which one of two sureties, whose land has been sold for the debt, agrees to pay the whole debt and to take an assignment of the bid at which the land was knocked down to the other surety, is not within the guaranty or land clause of the Statute of Frauds; an oral assignment of a bid at the sale of land under a *fi. fa.* is good.^(u) Where the plaintiff had obtained judgments against one William Merrill, and the defendant transferred them to the latter with a parol stipulation that the defendant should protect him from all costs in the matter; it was held not to be a guaranty, nor within the Statute of Frauds, as the promise was to pay the promissor's own debt, and the indemnity

(r) *Thomas v. Cook*, 3 Man. & R. 448, 8 B. & C. 732; see *Barry v. Ransom*, 12 N. Y. 462, citing cases; see *Jones v. Shorter*, 1 Kelly, 294; *Jones v. Letcher*, 13 B. Mon. 364; *Garner v. Hudgins*, 46 Mo. 399; *Ragland v. Wynn*, 37 Ala. 34; *Harrison v. Sawtel*, 10 Johns. 242; *Apgar v. Hiler*, 4 Zab. 814; *Draughan v. Bunting*, 9 Ired. 10.

(s) *Macey v. Childress*, 2 Tenn. Ch. 446, citing cases.

(t) *Rae v. Rae*, 6 Ir. Ch. 494, though the court said that an indemnity to a guarantor was not on broad grounds within the Statute of Frauds; see above. See, also, *Taylor v. Savage*, 12 Mass. 102; *Blake v. Cole*, 22 Pick. 97.

(u) *Hockaday v. Parker*, 8 Jones, No. Car. 18; see § 76.

was against his own acts, in putting the judgments into effect.(v) Where the drawees, the plaintiffs, refused to accept a bill until a surety was furnished and the defendant as such surety added his name as co-drawer, the Statute of Frauds applies to a promise by the surety to reimburse the drawees who paid the bill out of their own funds; *secus* as to the drawer, who was principal debtor.(w) But in Louisiana, it has been held that sureties who became such for the defendant, because a third person would not trust him without security, cannot upon paying have subrogation against the defendant, inasmuch as their promise being oral they had not been bound.(x) And where the defendant who had signed the note in suit, had done so only on an agreement with the plaintiff that one D. C. T. should also sign, and that he, the defendant, was to be only a surety, if proved, is a good defence to the note; and a subsequent promise to pay the note must be specially averred and be proved by a writing, if the plaintiff is to recover because such a promise would be a guaranty.(y)

§ 125. Another example of identity of interest between the guarantor and the person answered for, is where they have been or are parties to the same commercial paper. Thus, it

(v) *Merrill v. Smith*, 12 Ala. 572.

(w) *Nelson v. Richardson*, 4 Sneed, 309.

(x) *Levy v. Dubois*, 24 La. Ann. 401.

(y) *Loving v. Dixon*, 56 Tex. 78. So, where speaking of the defendant's agreement to become surety in an appeal for one C. the court said: "Because of the failure of Courteille to justify, and the failure of the court to approve the undertakings required by the order to entitle the defendant to any advantage under the undertaking, Bouton (the defendant) never became liable upon them; but it is sought to hold him by a parol agreement that he would consider himself bound. As he could not be bound originally as surety, except in writing; it is difficult to see how he could become bound by parol

upon an undertaking from all liability upon which he had been discharged by operation of law. Such an agreement to become bound would be clearly within the Statute of Frauds and void. The evidence showed that Bouton (the defendant), was presumptively discharged. No act was ever done which ever entitled the defendant in the marine court judgments to any stay whatever, because of the undertakings signed by Bouton. The co-surety of Bouton, Courteille, had become discharged, because of failure to justify, and Bouton had the right to claim the joint liability of his co-surety as a condition of his obligation. That was the undertaking he signed, and no other, and that undertaking cannot be made several by parol. *Gross v. Bouton*, 9 Daly, 30.

has been held, that an endorser discharged by a failure to demand payment of the maker, is said to be bound, notwithstanding the Statute of Frauds, by a promise to pay the note; though, as will be seen, there is much doubt on this point.^(z) In South Carolina it has been held that a promise by an endorser, discharged by want of presentation, and due notice had, is not a guaranty within the Statute of Frauds, because the action is on the old promise, not the new; the new promise merely dispenses with proof of demand and notice.^(a) An endorser so discharged can orally waive his rights.^(b) It has also been held that an authority by a guarantor to delay in prosecuting the principal need not be in writing; if the creditor acted on such authority, the guarantor would be estopped to set up the Statute of Frauds, and the consent was not a new guaranty in any sense.^(c) But, on the other hand, it has been held that a promise by an endorser to the holder of a promissory note, to indemnify him if he would sue the maker, is a guaranty within the Statute of Frauds, so far as the expenses of suit are concerned; as to the unpaid portion of the note, the endorser is liable as such.^(d) Where the defendant was endorser on a promissory note held by the plaintiff, but was discharged through neglect on the part of the plaintiff, a verbal promise by him to pay the plaintiff if he, the latter, will forbear to sue the maker of the note, is within the Statute of Frauds and invalid, and cannot be related back to the endorsement so as to make the latter the writing required by the Statute of Frauds.^(e) A verbal agreement by the sureties on an officer's bond, that on his re-election, after his first term had expired, the old bond should continue, is void under the Statute of Frauds.^(f) In the chapter on the memorandum, which discusses the validity of a memorandum subsequent to the contract, will be found some Pennsylvania decisions con-

Where guarantor and person answered for are parties to the same commercial paper; and where guarantor has been discharged from liability on the paper.

(z) Bank (U. S.) *v.* Southard, 2 Harris. (N. J.) 474.

(a) Fell *v.* Dial, 14 Shand, 251.

(b) Edwards *v.* Tandy, 36 N. H. 543.

(c) Day *v.* Elmore, 4 Wis. 190.

(d) Winckworth *v.* Mills, 2 Esp. 483.

(e) Peabody *v.* Harvey, 4 Conn. 122.

(f) German Vet. Soc. *v.* Finzer, 1 Kent. Law Report, 57.

sidering the present point, see § 321 and n. Where a person liable on a note, becomes aware of a certain fraud which would have enabled him to avoid paying the note, but verbally promises upon being given time to take up the note, his promise is not a guaranty. *(g)* There being no liability in an ordinary case upon the drawers of a bill to reimburse the drawee, though the drawee, who had had no funds, would be entitled to reimbursement, yet if two of the drawers were sureties, and he knew it when he paid, the ordinary rule prevails, and he is not entitled to reimbursement from these two, but only from the principal maker; hence, a parol promise by the sureties to reimburse him is a contract for which they were not, and the principal was, liable, and is a guaranty within the Statute of Frauds. *(h)* One nominally a surety may execute a written obligation in such a form as to show that his liability is really original. *(i)*

§ 126. Where the guarantor is a joint-contractor with the person answered for, that is to say, where the two, for example, are joint-purchasers, the apparent guar- Joint-con-
tractors. anty is really an original undertaking. *(j)* Where the defendant with S. applied to the plaintiff for a loan to S., and S. gave a note, which the plaintiff received on the faith of the verbal guaranty of it by the defendant, it was held that the evidence showed that the debt was due from S., and that the defendant's promise was only a guaranty; that it was not a joint-note, nor the debt of the defendant, and that the Statute of Frauds applied. *(k)* A joint-note shows an original liability, though the benefit of the transaction accrued to but one of the promissors. *(l)* A party to a bill is not a guarantor within the Statute of Frauds. *(m)* Where the defendant, one Meriott, requesting the plaintiff to let the defendant, Hampson, have the goods which they had refused him, agreed verbally that the credit should be given them

(g) Rindskopf v. Doman, 28 Ohio St. 520.

(h) Wing v. Terry, 5 Hill, 162.

(i) Perkins v. Goodman, 21 Barb. 220.

(j) Spear v. Hart, 3 Roberts, 424.

(k) Daniel v. Mercer, 63 Ga. 444.

(l) Brooks v. Dent, 1 Md. Ch. Dec. 526.

(m) O'Donnell v. Smith, as cited in 2 Ames, Cases on Bills, 782.

jointly, and the invoice was made in the joint names, it was held that the Statute of Frauds did not apply; Merriott was not Hampson's partner as the plaintiffs knew.⁽ⁿ⁾ Where a chattel was delivered under an agreement that two shall sign a note for the price, viz., the purchaser of the machine and another, who, under the verbal contract, was surety for the latter, and the purchaser signed and the surety excused himself, saying that he would sign the note the next day, both are liable, notwithstanding the Statute of Frauds. *Semble* that the previous parol agreement was within the Statute; but *secus* as to the understanding at the time of the delivery of the machine.^(o) In an action of *assumpsit* for the price of a mare against D. and Gibbs, the following charge was held to be correct, that "if it was the understanding of the parties that D. was the purchaser, that he should give his note to the plaintiff for the price, and that G. should sign so as to be liable as endorser, the plaintiff must fail" (no such endorsement was made in fact). "If, however, the understanding of the parties was at the time that Gibbs and D. were buyers of the mare, and that both were to be liable as purchasers for the purchase price, and accordingly should become joint makers of a promissory note for its payment, though D. was less relied on by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare, when bought, should belong to D., the plaintiff is entitled to recover;" no note was given.^(p) Where B., in consideration of the sale of a vessel to A., joined with him in an agreement to deliver lumber, it was held to be a joint contract, although B. was only surety, and the consideration, therefore, need not appear in the written agreement.^(q) But that M., who was liable to the plaintiff for work being performed, introduced the defendant to the plaintiff as his, M.'s, partner in the transaction, and that the defendant approved the work, and told the plaintiff that he

(n) Scholes v. Hampson, Fell, Guar., 299; see Wainwright v. Straw, 15 Vt. pl. 19 (3d Am. ed.), p. 38. 215; Hotchkiss v. Ladd, 36 Vt. 593.

(o) Van Riper v. Baker, 44 Ia. 451.

(q) Thompson v. Cummings, Rob. &

(p) Gibbs v. Blanchard, 15 Mich. Jos. U. C. Dig. 1629.

would pay if defendant did not, was held not to be sufficient to make the defendant an original promissor.(r)

§ 127. When the defendant who has as consideration or as payment assigned to the plaintiff an obligation (whether evidenced by note or otherwise) due him, the defendant, and agrees with the plaintiff to answer for its fulfilment by the obligor, the Statute of Frauds does not apply.(s) Thus it has been held, that a guaranty of a note sold for a valuable or any sufficient consideration is not within the

Guaranty
of a debt
assigned.

(r) *Stidham v. Sanford*, 36 N. Y. Sup. 343.

Where the undertaking of the surety is not for a direct performance by himself, but that his principal shall perform, and that he will be bound in case of non-performance by the principal, the undertaking is collateral. It is a promise distinct and separate from the original contract, to which it is collateral, and must be in writing and express the consideration; *Perkins v. Goodman*, 21 Barb. 220.

So said the court in a North Carolina case: "Now the liability to creditors of the defendants and their sister, as next of kin, was not joint, but arose, if at all, by reason of that portion of the assets of their father, which came to their respective hands as their several shares of the estate. Each was, therefore, liable for only an equal proportion of the money; at all events, in the first instance, and while the others were able to pay their parts, which is not questioned here. Hence, it is obvious, if one of the defendants had verbally promised to pay the whole of this demand, that the promise would not have been binding, under the Statute of Frauds, beyond his own one-third; for, beyond that, the liability was not his own, but that of another. It seems clear that an undertaking by the defendants in a joint form to pay the whole debt cannot alter the rule of

law, or the legal effect of the promise as to each, in that respect. For if two persons owe another separate debts, their joint oral promise to pay both debts cannot sustain a joint action, since it is a promise by each to answer for another in respect to all but his own original debt;" *Hill v. Doughty*, 11 Ired. Law, 197.

(s) *McLaren v. Hutchinson*, 22 Cal. 190; *Mobile R. R. v. Jones*, 57 Ga. 200; *Danst v. Bates*, 95 Ill. 512; *Jennings v. Crider*, 2 Bush, 325; *Jones v. Palmer*, 1 Doug. (Mich) 380; *Thomas v. Dodge*, 8 Mich. 54; *Barker v. Scudder*, 56 Mo. 275; *Lossee v. Williams*, 6 Lans. 228; *Cardell v. McNiel*, 21 N. Y. 339; *Fowler v. Clearwater*, 35 Barb. 149; *Seaman v. Hasbrouck*, 35 Barb. 153; *Milk v. Rich*, 22 N. Y. Supreme, 179, 80 N. Y. 269; *Dauber v. Blackney*, 38 Barb. 434; *Bruce v. Burr*, 67 N. Y. 241; *Ashford v. Robinson*, 8 Ired. 116; *Rowland v. Rorke*, 4 Jones, 339; *Adcock v. Fleming*, 2 Dev. & Bat. 227; *Malone v. Keener*, 44 Pa. St. 107; *Taylor v. Preston*, 79 id. 441; *Peck v. Thompson*, 15 Vt. 639; *Story v. Menzies*, 3 Pinn. (Wis.) 330; *Eagle Mowing Machine Co. v. Shattuck*, 53 Wis. 455; *Wyman v. Goodrich*, 26 Wis. 22; *Rarey v. Cornell*, Franklin Dis. Court (Wis.), 2 West. L. M.; see, also, *Boehm v. Campbell*, 8 Taunt. 681; *How v. Kemball*, 2 McLean, 107.

Statute.(*t*) The Statute of Frauds has been held not to apply, "or as the same thing is sometimes expressed, a guaranty is not within the Statute where the debt or contract guaranteed was transferred from the guarantor to the guarantee at the time of making the contract of guaranty upon a consideration moving wholly between the parties to the guaranty."*(v)* Where the payee of a note endorsed it to the plaintiffs as follows: "I sell, assign, and guarantee payment of the within note," etc., this was held to be an absolute engagement, and no notice of non-payment, etc., was necessary.*(w)* In a much disputed New York decision, where the contest waged mostly about the sufficiency as a memorandum of a certain endorsement upon a promissory note, two of the judges thought that the Statute of Frauds did not apply, because the note in suit was taken as payment for the guarantor's debt, evidenced by a note for which the new note was substituted.*(x)* This same principle has been applied to an endorsement on a check that it is good, the check being passed into the exchange account;

(*t*) *Nichols v. Allen*, 22 Minn. 283; *Mallory v. Gillett*, 21 N. Y. 412; 23 Barb. 610.

In a case in 5th Philadelphia Judge Hare said: "A promise to pay for goods bought by another is within the Statute of Frauds, although imposing a direct and primary obligation, because the consideration moves to the purchaser; and the debt is his, and not that of the party who makes the promise. But a promise that another shall pay a debt due by us, is really a promise for the payment of our own debt, although by an indirect and circuitous means. And the case is even stronger in appearance, if not in fact, when the note or bond of a third person is given by a debtor to his creditor as satisfaction, with an oral guaranty that it shall be paid, when due, by the maker or obligor, because the object of the transaction appears on its face, and is plainly not within the meaning of the Statute.

The law was so held in *Johnson v. Gilbert* (4 Hill, 178), and in several other cases, which are equally convincing by their authority and the force of their arguments;" *Stewart v. Malone*, 5 Phila. 440.

(*v*) *Wilson v. Hentges*, 29 Minn. 103.

(*w*) *Allen v. Rightmere*, 20 Johns. 366.

Where S., the agent of the defendant, sold a patent-right belonging to the latter to A., who gave S. a note payable to the defendant or bearer, this note S. assigned to the plaintiff in payment for goods sold him, S., and guaranteed it, it was held that the defendant who assented to the entire transaction was bound by the guaranty, which was not within the Statute of Frauds; *Lossee v. Williams*, 6 Lans. 228.

(*x*) *Brown v. Curtiss*, 2 Comst. 233; see *Lossee v. Williams*, 6 Lans. 228; see, *contra*, below.

the certificate is a promise by the bank to see paid a debt due by them ;(y) the bank, moreover, is supposed to have funds of the maker of the check out of which to pay the latter.(z) So, where the defendants assigned to the plaintiff a bond in which they were obligees, and guaranteed its payment, the Statute of Frauds does not apply, because there is a new and beneficial consideration accruing to the defendants ; the assignment was not apparently in payment of any previous debt.(a) Where the defendant assigned to the plaintiff a note, which he, the defendant, held, payable by L., under the agreement that if in a suit by L. against the plaintiff the note should be sustained as a set-off, the plaintiff should account to the defendant, but that if the plaintiff should lose his suit, the defendant should pay the costs and expenses thereof. The plaintiff lost his suit with L., it was held that the defendant's promise was not a guaranty within the Statute of Frauds, the consideration to the defendant being the chance of getting his note paid.(b)

(y) *Mead v. Merchants' Bank of Albany*, 25 N. Y. Rep. 149.

(z) In a case in 57 Georgia, speaking of the obligation of the defendant, a railroad company, the court said : " It was to pay its own debt ; it was to guarantee certain papers that the defendant had turned over to him " (the plaintiff's assignor) " in lieu of money, and which it agreed to make equal to money. We do not think it comes within the Statute of Frauds. We think, therefore, that no error was committed by the court in refusing to interfere with the verdict on these points ; " *Mobile R. R. v. Jones*, 57 Ga. 200.

(a) *Aikin v. Cheeseborough*, 1 Hill (So. Car.), 173.

So, where the defendant assigned to one K. a bond made to him, the defendant, by one G. to enable K. to get credit for purchases, K. bought from the plaintiff, who relied on the bond endorsed in blank by the defendant, it was held that the Statute of Frauds

did not apply, the new consideration rule being relied on ; *Hopkins v. Richardson*, 9 Gratt. 490.

(b) *Brantley v. Carter*, 26 Miss. 285. In a Minnesota case the court said that an arrangement as follows would not, even if it had been oral, have been within the Statute of Frauds : " The defendants had received from the plaintiff certain threshing machines to sell on commission, and upon certain terms and conditions, by which, among other things, they were obligated to sell to none but responsible parties, and to endorse or make secure to the plaintiff's satisfaction all notes taken on sales made to persons considered irresponsible by the plaintiff.

" The notes in question were received by the defendants, in part payment of one of the machines sold by them to the makers under this agreement. Deeming the makers irresponsible, the plaintiff refused to accept the notes. Whereupon, to induce him to take them,

A representation and warranty that a promissory note, secured by a mortgage of land, was good, that the debtor was able to pay, and that the mortgaged premises were sufficient security, and were otherwise unencumbered, is not within the Statute of Frauds.(c) So it was said in another case, that the promise was not a guaranty, but was really in fact a conditional payment. The defendant paid the plaintiff with a non-negotiable note of C.'s. which he, the defendant, held. He further promised, by parol, that if C. did not pay the amount of the note he would. C. proved insolvent, and the defendant was held on the verbal promise.(d) Where the defendants, the sellers

and credit their amount on their indebtedness to him under the agreement, the plaintiff took them with such guaranty in satisfaction and discharge of the obligation of the defendants, under said written agreements, and their indebtedness to him thereunder, to the amount of the notes for threshing machines theretofore delivered. It thus appears that the contract of guaranty endorsed upon both notes, was supported by a valid consideration beneficial to the defendants, and proceeding to them directly from the plaintiff. The leading purpose of the defendants in making it was to promote their own interest by obtaining a discharge from a then existing liability to the plaintiff, and not simply to become sureties upon the notes for the benefit of the makers, or at their request. Their promise in each case was an original one, as distinguished from a purely collateral undertaking, founded upon a valid consideration, moving solely from the plaintiff to them, and wholly distinct and independent of the notes to which the guaranty related."

The defendants agreed, in writing, in consideration thereof, to procure the makers of the notes to give security for their payment, or, in default thereof, to endorse them personally to the

plaintiff. Failing to obtain such security the defendants guaranteed their collection; *Sheldon v. Butler*, 24 Minn. 515.

(c) *Huntington v. Wellington*, 12 Mich. 15. A verbal guaranty of a note that it was valid and good by one who assigned it in part payment of a debt, will bind him, notwithstanding the Statute of Frauds, the note being in fact usurious and void; *White v. Webster*, 58 Ind. 236.

(d) *Hall v. Rodgers*, 7 Hunphr. 536. In an action founded on the guaranty of certain railroad bonds, it appeared that the defendant owed the plaintiff, and offered three railroad bonds in payment, the plaintiff hesitated, but the defendant said he would guarantee them, so that there would be no loss to her. The court said that while the plaintiff's guaranty in this case was of the debt of another, it was much more. So far as originality is concerned, it is the same as if he owned the bonds themselves. It is not necessary that the seller should be owner of the goods in order to make him liable on a guaranty of them; and as the defendant induced the plaintiff to purchase them, he is liable, notwithstanding the Statute of Frauds; *Allen v. Eighmie*, 14 Hun, 559.

of a contract to deliver chattels agreed by parol with the buyers, that if the original promissors in the contract did not fulfil it, they, the sellers of the contract, would, the Statute of Frauds was held not to apply, there being a new consideration arising to the defendants, from the price for which they sold the contract.(e) Where the purchaser of a chattel paid for it with the note of a third person, whose solvency he warranted, the Statute of Frauds was regarded as not applying, because the engagement was rather a warranty than a guaranty.(f) A promise by the assignee of the vendee of land, under written articles, made to such vendee, to pay the vendor certain unpaid purchase-money, is an original promise, and not within the Statute of Frauds; the vendee as holder to use of the vendor, brought an action against the assignee of the contract.(g)

§ 128. There are two or three instances of promises in which the principle now under consideration has, perhaps, been disregarded. Thus, where a buyer of goods paid for them with the note of a third party, ^{The rule disre-} which he refused to endorse, but which he said was good, it was held to be no promise, but, query, if it were, whether it was not a guaranty, and within the Statute of Frauds.(h) In two New York cases the same view was taken. Thus it was held, that an endorsement of a note assigned was insufficient for not showing a consideration.(i) And in a later decision, there being such an endorsement, it was held that it was not competent in such a case to show by oral evidence that the defendant was paying his debt to the plaintiff by assigning the note guaranteed.(j) Where a debtor upon a due-bill, when the latter became due, gave some cash and a note of R.'s, which he guaranteed, and when in the suit the creditor elected to go to trial on a count on this guaranty, and to have a count on the due-bill stricken out, the Statute of Frauds (the

(e) *Beaty v. Grim*, 18 Ind. 132.(h) *Carpenter v. Wall*, 4 Dev. & Bat.(f) *Hassinger v. Newman*, 83 Ind. 145.

125.

(i) *Johnson v. Gilbert*, 4 Hill, 178.(g) *Taylor v. Preston*, 79 Pa. St.(j) *Wood v. Wheelock*, 25 Barb.

441.

626.

guaranty clause) applies, the due-bill being extinguished.^(k) The distinction upon which this case goes is certainly a fine

(*k*) *Dows v. Swett*, 134 Mass. 145 ; 16 Am. L. Reg., N. S., 473, with a long note by Edmund H. Bennett, Esq. The same case on previous appeals, 120 Mass., 323, and 127 Mass., 364, citing cases; see a criticism on this case in 27 Alb. L. J., 323. The following extracts from the opinion of the court in the last appeal show the course of reasoning on which the decision rested:—

“Where a note of a third party is taken by a creditor from his debtor for or on account of a pre-existing debt, or as a consideration then first accruing, it may be received either in absolute payment, conditional payment, or as collateral security. And in every case it may be shown by evidence what was the actual transaction, and on what terms the note was received; *Butts v. Dean*, 2 Met. 76; *Parham Sewing Machine Co. v. Brock*, 113 Mass. 195. Where such note is taken in absolute payment of a pre-existing debt, or of a liability for money lent, service rendered, or other consideration accruing at the time of taking it, the effect, of course, is to extinguish the liability of the person who transfers the note, and to substitute therefor the liability of the parties to the note, as the sole subsisting obligation. But where the note is taken as collateral security, or in conditional payment, the right of action against him who makes the transfer is not defeated altogether, but is at most only suspended during the time the note has to run, and revives again upon the non-payment of the note at its maturity. The original indebtedness in such case is not discharged, unless the note is paid; *The Kimball*, 3 Wall. 45; *Byles on Bills* (6th Am. ed.), 236,

380, 385; 2 Am. Lead. Cas. (4th ed.), 250, 251, and cases cited; *Belshaw v. Bush*, 11 C. B. 206, 207; *Valpy v. Oakeley*, 16 Q. B. 949; *Miles v. Gorton*, 2 Cr. & M. 512. In the latter class of cases the transaction is as if the debtor said, ‘I owe you a debt; take this note and collect it if you can. If you get the money on it, that will pay you. If you do not, I will myself pay you what I owe.’ In all such cases the defendant’s promise is in effect to pay his own debt; and it is not necessary that such promise should be in writing, though incidentally the debt of a third person is guaranteed. And many of the decisions of courts which at first sight may appear to hold that an oral guaranty of the note of another, which is transferred on account of a debt due from the guarantor, is not within the Statute of Frauds, on careful examination will be found not to rest on that principle, and not to be necessarily inconsistent with our own conclusion in the present case. . . . The above suggestions will not reconcile all the cases, but in our opinion they are sufficient to show the just grounds on which the application of this clause of the Statute of Frauds, now under consideration, depends. When the present case was first before this court the decision was put expressly on the ground that the defendant’s previous liability had been settled and discharged, so that the only existing direct liability was that of Robinson upon his note; and under this state of things the defendant’s oral promise to pay the note, if Robinson did not, could not be treated as a promise to pay Robinson’s debt, and as such was within the Statute of Frauds. Upon further consideration we adhere to that decision

one, and the decision itself should not be followed without full deliberation. It may be well to consider whether the principle laid down therein has any virtue beyond the peculiar facts of the special controversy.

§ 129. The obligation answered for by the guarantor may, though oral, be valid, because the guarantor's own, in the sense that it is a lien or encumbrance upon his property, or, which is less certain, that the consideration thereof has enured to the improvement or benefit of such property.^(l) Serjeant Williams's rule, already cited, notices this exception in saying that, if the person answered for remained liable, the Statute of Frauds applied, in absence of any liability on the part of the defendant *or his property*, except such as arises from the express promise.^(m)

Guaranty of debt resting on guarantor's property.

as a correct exposition of the law. When the case came a second time before the court (127 Mass., 364) the point determined was, that the plaintiffs were not precluded by what had happened before from relying on the second and third counts, and for this reason a new trial was properly granted. An additional statement in the opinion may have led to the inference that in the view of the court, if the leading and chief object of the defendant's promise was in effect to pay his own debt, it is to be considered in substance that the defendant guaranteed his own debt, and that, therefore, his promise to pay Robinson's note, if Robinson should not, was not within the Statute of Frauds; and the learned judge of the superior court upon the new trial so ruled. But we think this ruling cannot be supported as applicable to the case as it comes before us. If Robinson's note was not taken in absolute payment, and if the due-bill was still an existing liability, then the defendant's promise might, perhaps, be found as a matter of fact to have been intended and accepted as a promise to pay the due-bill. But if the note was taken in absolute payment, then the

liability of the defendant was, of course, extinguished, and it follows that the only remaining direct liability was that of Robinson on his note, and the promise of the defendant could be treated only as collateral.

"The question, therefore, is now distinctly presented whether the defendant can be held liable on an oral promise to guarantee the note of a third person, transferred by him to his creditor, when that promise cannot by any construction be enforced as in reality a recognition of, or promise to pay, his own pre-existing debt. To hold him liable, under such circumstances, would be to hold him to a greater liability than if he had put his name upon the back of the note, and would be inconsistent with the Statute."

(*l*) Barrell v. Trussell, 4 Taunt. 120; Helms v. Kearns, 40 Ind. 129; Beach v. Jones, 50 Ind. 531; Chamberlin v. Ingalls, 38 Ia. 300; see Blair Township Co. v. Walker, 39 id. 406; Bethel v. Woodworth, 11 Ohio St. 395; Tallman v. Bressler, 65 Barb. 378; see Spooner v. Dunn, 7 Ind. 81.

(*m*) Forth v. Stanton, 1 Will. Saund. (Sir E. V. Will. ed.) 233, note; see Furbish v. Goodnow, 98 Mass. 297.

§ 130. There are a few cases which in appearance and some which in reality impugn this rule. Thus where the plaintiff held notes of E., secured by a chattel-mortgage, and E. could not sell without the plaintiff's consent; E., with such assent, sold to S. at the defendant's inducement, and the latter promised to pay the plaintiff so much of E.'s debt as S. did not pay; the defendant's reason for the promise was a promise by E. to answer for a debt which E. owed the defendant: it was held that the defendant was entitled to the defence of the Statute of Frauds; but here it will be noticed that the defendant had no interest in the goods, and a guaranty is not the less within the Statute because it was given in consideration of another guaranty.⁽ⁿ⁾ In another Massachusetts case it was held that, in absence of a direct promise to either the debtor or the creditor, the assignee of property subject to a lien is not (personally?) liable to pay the latter.^(o) So it is no defence by way of set-off to a note that it was a lien upon certain land, that the vendee of the latter, who originally gave the note, mortgaged it without consideration to one C., who transferred the mortgage to the plaintiff, because the only personal liability was in C., and that the plaintiff was not liable even at common law unless he promised to pay, nor under the Statute of Frauds unless he promised in writing; his land was still subject to the lien, but he was not bound in any way.^(p) These rulings are not inconsistent with the principle now under discussion; but it would be difficult to justify the following: The plaintiff bound himself in writing to deliver to a constable goods belonging to the father of the defendant; the latter claimed the goods, and prevented the plaintiff from delivering them to the constable, who sued him and got judgment; the defendant went on the plaintiff's *certiorari* bond, and also orally promised to indemnify him against all the damages; the judgment against the plaintiff was reversed, and then the constable got a new judgment

(n) *Richardson v. Robbins*, 124 Mass. 107; see the facts more fully stated, 247.

(o) *Brightman v. Hicks*, 108 Mass.

§ 133, n. (c). See as to the last point, *Danforth v. Pratt*, 42 Me. 52.

(p) *Brake v. King*, 54 Ind. 296.

against him; for indemnity against this latter this suit was brought; the defendant's promise was held to be a guaranty, and within the Statute of Frauds, because *semble* the default here was in not paying the original debt. But it would seem that the decision should have been otherwise, because the plaintiff involved himself in the first obligation in order to release to the defendant goods owned or claimed by the latter.(q) So where H., a vendee, under articles from the plaintiff, assigned his contract to the defendants, his creditors, who extinguished his debt, and gave him credit in trade besides, to make the debt and the credit together equal the first instalment due under the contract, which H. had paid; H. reserved the right, upon repaying the defendants, to redeem; the defendants promised H. to pay up the subsequent instalments: the Statute of Frauds was held to be a good defence, the agreement being a guaranty.(r)

§ 131. As the promise by one interested in property subject to a lien is usually made upon a surrender of the lien for which the promise of guaranty is substituted; Surrender
of a lien. it is pertinent to say here, that where the promisee relinquishes a lien which enures to the promissor, the lien is as it were purchased, and the Statute of Frauds does not apply.(s) Thus, it has been said that the Statute of Frauds does not apply where the plaintiff in consideration of the promise has relinquished some lien, benefit, or advantage, for securing or recovering his debt, when by means of such relinquishment the same interest or advantage has enured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly; and the substance of the contract is the purchase by the defendant of the plaintiff of the lien right, or benefit in question.(t) As to the purchase of the lien, see note below.(u) Where by giving

(q) *Nixon v. Vanhise*, 2 South. 492. *ditch v. Milne*, 3 Esp. 86; *Belknap v.*

(r) *Roe v. Barker*, 82 N. Y. 435. *Bender*, 6 Th. & C. 613; 4 Hun, 414;

(s) *Alger v. Scovill*, 13 Gray, 391; *Small v. Schaefer*, 24 Md. 156.

Furbish v. Goodnow, 98 Mass. 297; (t) *Curtis v. Brown*, 5 Cush. 491.

Hilton v. Dinsmore, 21 Me. 410; *Houl-* (u) *Castling v. Aubert*, 2 East, 330.

the guaranty the promissor gains possession of certain goods, and the promisee gives up the latter, which he held as security, the Statute of Frauds does not apply.(v)

§ 132. From this point forward the subject of promises to answer for a debt resting on the promissor's property, and that in which a claim or lien thereon is surrendered to him in consideration of a promise to answer for the debt which the lien, etc., represents, will be treated together.

§ 133. The lien, as has been said, must enure to the promissor.(w) In a Wisconsin case, the court said: "The mere fact that an advantage may result incidentally to the promissor is not alone sufficient to take the agreement out of the statute. The resulting advantage to him must be the object of his promise—the consideration upon which it was made. We are not aware of the existence of any rule of law which authorizes the inference that, merely because the promissor may be incidentally benefited by his promise, his object in making it, and the consideration therefor, is such incidental benefit."(x) Giving up a lien on the plaintiff's part will not take a case out of the Statute of Frauds, where the defendant had no interest in the matter.(y) Where the plaintiff forbore an action by which he had a lien upon the property of his debtor, the Statute of Frauds applied, though the defendant was the debtor's son, it not appearing that he had any interest in his father's property.(z) The abandonment of a levy by a judgment creditor on the goods of his debtor, does not take an agreement by a third person to pay the debt out of the Statute of Frauds, the

(v) *Hindman v. Langford*, 3 Strob. Law, 209; see *Borchsenius v. Canutson*, 100 Ill. 92.

(w) *Clancy v. Piggott*, 4 N. & M. 502; 2 A. & Ell. 473; *Fennell v. Mulcahy*, 8 Ir. L. R. 434; *Luark v. Malone*, 34 Ind. 444; *Nelson v. Boynton*, 3 Mete. (Mass.) 400; *Dexter v. Blanchard*, 11 Allen, 361; *Dufolt v. Gorman*, 1 Minn. 309; *Robinson v. Gilman*, 43 N. H. 490; *Van Slyck v.*

Pulver, Hill & Denio, 47; *Mallory v. Gillett*, 21 N. Y. 413; *Boyce v. Owens*, 2 McCord, 208; but see *Stewart v. Hinkle*, 1 Bond, 506.

(x) *Clapp v. Webb*, 52 Wis. 641.

(y) *Cowenhoven v. Howell*, 36 N. J. Law, 325; see *Fennell v. Mulcahy*, 8 Ir. L. R. 434.

(z) *Nelson v. Boynton*, 3 Mete. (Mass.) 400; see *Cowenhoven v. Howell*, 36 N. J. Law, 325.

abandonment does not appear to have enured in any way to the promissor.(a) Where an auctioneer, who was about to sell goods of a tenant on the premises of the latter, was served by the landlord with a notice of rent due, and promised the landlord to pay such rent, it was held that the part of the promise relating to the future rent, for which the landlord had no right of distress, being within the Statute of Frauds, and the promise being entire, the whole was within the Statute.(b) Where the defendant was the mortgagee of a part interest in a vessel, and the plaintiffs had a claim against the owners of the vessel, but no lien as to the vessel, and as the owners of the interest mortgaged to the defendant were in bankruptcy, this interest could not be attached by the plaintiff; under these circumstances a promise by the defendant to the plaintiffs to pay their claim in consideration of their not attaching the interest of the other owners, was held to be within the Statute of Frauds, and the forbearance of the plaintiffs was held not to enure to the defendant.(c) In another Massachusetts case, it was said that "the law is well settled in this commonwealth that, when property subject to lien is transferred by the debtor to a third person, the latter is not liable to an action by the creditor, unless he has made a direct promise, either to the debtor or the creditor to pay the debt; and that such a promise to a creditor, who neither gives up his claim against the original debtor nor any lien upon the property, is a promise to

(a) *Stern v. Drinker*, 2 E. D. Sm. 404.

(b) *Thomas v. Williams*, 10 B. & C. 668, distinguishing *Williams v. Leper*, on the above ground, and *Edwards v. Kelly*, and *Castling v. Aubert*, as cases of a fund.

(c) *Ames v. Foster*, 106 Mass. 402. Where the plaintiff held notes overdue of E. secured by a chattel mortgage; E. could not sell the chattels without the plaintiff's consent; the plaintiff allowed E. to sell to S. who became liable under the mortgage at the defendant's inducement, who promised to pay the plaintiff whatever amount under

the mortgage, and notes S. did not pay; the consideration for the defendant's promise was S. guaranteeing a debt which E. owed the defendant. This was held to be a guaranty, as E.'s debt to the plaintiff was not discharged; as the plaintiff gave up no right (as the notes being due his right of action against E. was ripe), and as no advantage was surrendered to the defendant, and as there was no purchase or acquisition by the defendant of property or benefit from the plaintiff which would make the new promisee one to pay a debt of the defendant's own; *Richardson v. Robbins*, 124 Mass. 107.

answer for the debt of another, and must be in writing in order to satisfy the Statute of Frauds.^(d)

§ 134. There are some cases in which an oral guaranty has been sustained, though the lien given up to the plaintiff did not appear to have enured to the defendant.^(e)

Cases
contra.

§ 135. Whether the relinquishment by the promisee of an opportunity to acquire a lien will have the same effect as the surrender of an actual lien is not so clear. The defendant, as agent of the tenants of land, employed by them to sell goods thereon, promised the landlord, who was about to distrain on these goods, which were distrainable, that if he would not do so, he, the defendant, would pay the rent due. It was held that the Statute of Frauds did not apply.^(f) Where the plaintiff, a surety, having property in his hands belonging to the principal debtor liable to levy, and confiding in the promise of the principal's son to pay the debt, saved the property from levy, it was held that the Statute of Frauds did not apply.^(g) Where at the guarantor's request the promisee, who had put the claim into the sheriff's hand for collection, forbore to issue execution, and by the delay lost his money, the guarantor was held liable to the extent which on a later sale of the debtor's land the proceeds fell below the amount of the judgment and all costs.^(h) C. was indebted to one Banks and one Davis, and sold his goods to Banks for a price larger than his, Banks's, claim. C. was insolvent, and Davis was about to attach the goods, so as to prevent Banks taking them away, when Banks promised Davis that if he would forbore he, Banks, would account to him for the surplus above his, Banks's, claim. This was held not to be within the Statute of Frauds, since it was on a new consideration, and was the

^(d) *Brightman v. Hicks*, 108 Mass. 247.

^(f) *Bampton v. Paulin*, 12 Moo. 499; 4 Bingh. 264.

^(e) *Allen v. Thompson*, 10 N. H. 34; *Mercein v. Andrus*, 10 Wend. 461; *Fay v. Bell, Hill & Den.* (Lal. Supp.)

^(g) *Bunting v. Derbyshire*, 75 Ill. 410; see *Siau v. Pigott*, 1 Nott & McC. 124.

^(h) *Dunlap v. Thorne*, 1 Richards. 214.

^(h) *Abel v. Wilder*, 9 Lea, 453.

surrender of a lien.(i) Where there was a promise, whereby the promisees, to whom one M., their debtor, was about to execute a mortgage, allowed M. to execute the mortgage to the promissors and discharged M. from his liability, in consideration of the promissors' agreement to assume it, it was held that the Statute of Frauds did not apply.(j) A printer, who was printing a book for a publisher, held a portion of it till his bill was paid. The publisher failed, and assigned his property to the defendant, who undertook the completion of the work. It was held that a promise by the latter to the printer, who was in possession of some of the sheets of the book, but who had no lien on them for his claim, that he, the printer, should be paid if he would deliver the book to the promisor, was original, and not within the Statute of Frauds.(k) Where the plaintiff had a claim under which he

(i) *Davis v. Banks*, 45 Ga. 140. Where the lessor of land came with her tenants to the plaintiff's store and gave a guaranty for goods ordered by them, and afterwards "the plaintiff visited the house with the defendant. Defendant paid \$30 on account, and promised to pay the balance, plaintiff agreeing not to attach the property. I think, said the court, the proper conclusion to deduce from the evidence is, that there was either a transfer or abandonment of the property by the tenant; that the property came into the possession of defendant, and on the faith of her promise the plaintiff did not obtain a lien by attachment which he could have acquired. That this amounts to a new contract of sale, and a new consideration passing between the parties with a new purchaser in lieu of the original contract, and that the promise of the defendant was not a promise to pay the debt of another, but a promise to pay a new contract price, a promise on the part of the defendant to pay plaintiff for the goods in defendant's possession, if plaintiff

will not attach them;" *Littell v. Porret*, 4 N. J. Law J. 309.

(j) *Graves v. Shulman*, 59 Ala. 407. It has been said that if the promisee was restrained from filing his claim for a lien, by a promise of the defendant to pay him, by which his lien against the property was lost, the defendant would be answerable on his promise; *Andre v. Bodman*, 13 Md. 255.

(k) *Gardner v. Hopkins*, 5 Wend. 23. Where the plaintiff having shipped goods, which arrived in a damaged condition, was about having them surveyed by the port wardens, with a view of establishing by the testimony of the latter the extent of the injury, and charging the ship owners; when the defendant, the agent of the ship owners, promised that if the plaintiff would desist and sell the goods at auction, he, the defendant, would pay the difference between the result of such sale and the invoice price. It was held that this was not within the Statute of Frauds. But it is not clear how the abandonment of the advantage of having the port warden's survey enured to the de-

asserted he could enforce a lien against a vessel of which the defendant was owner, and the defendant thought there was no claim against him personally, promised that if in another case the court should decide there was a lien under the then circumstances, and if the plaintiff would forbear to sue, he, the defendant, would pay; it was held that the Statute of Frauds did not apply, for the object of the promise was to get a release of the defendant's property, and the defendant was estopped to deny the lien, as the court in the test case had decided that there was a lien.^(l) Where the promissor had been threatened with a suit by the promisee, who proposed showing that the former had no right to property held by him, was not a creditor of the real owner of the property, and that he, the promisee, was such a creditor, and thereupon the promise was made, the Statute of Frauds was said not to apply, the "Funds" rule being relied upon.^(m)

§ 136. There are some instances in which, under circumstances of this same character, the Statute of Frauds applied. Thus it has been said that a promise to relinquish a claim is not a relinquishment, and that where it was agreed between the plaintiff and defendant, who had given a note for the price of land bought by the latter, that he, the defendant, should give up the land to the plaintiff, and that the plaintiff should pay the note, and hold the defendant indemnified therefrom, the Statute of Frauds applies.⁽ⁿ⁾ A mere promise to give up a lien without doing so is within the Statute.^(o) In a New Hampshire case it was suggested that an indemnity to one for becoming surety for the defendants in an action of trespass is within the Statute of Frauds, though the indemnitor was the claimant of land on which the defendants in the suit of trespass had entered and cut timber as the indemnitor's

The Statute of Frauds sometimes applied in the instances under the last rule.

defendant. It was said, and this seems to be a better reason for the decision, that for this particular debt the ship owners were never liable. They were liable for the price of the goods if abandoned. Not having abandoned the goods, and not having had the usual survey, *semble* the plaintiff could not

have held them; *Travis v. Allen*, 1 Stew. & Porter, 193.

(l) *Fish v. Thomas*, 5 Gray, 48.

(m) *Smith v. Rogers*, 35 Vt. 145.

(n) *Bumford v. Purcell*, 4 G. Green, 490.

(o) *Danforth v. Pratt*, 42 Me. 52.

agents.(p) Where the plaintiff had a lien against a vessel, which S. was building, and the defendant, who held the vessel for advances made to S., and who did not wish the plaintiff to enforce his lien, agreed verbally to accept an order on them drawn by S. in favor of the plaintiff, neither the latter's lien against the vessel nor his claim against S. were released; the Statute, therefore, was held to apply.(q)

§ 137. The property subject to the lien may be realty or personalty; the following are some examples relating to the former. Thus, where the plaintiff was surety for E. for rent, and the latter assigned his lease to the defendant, and it was agreed that the latter should indemnify the plaintiff against all liability under the suretyship, and this he agreed to in writing, the latter referred apparently to future rent; and, at the time of assigning the lease and making the above agreement, it was orally agreed that the plaintiff should remain liable for a month's rent past due. This rent the defendant paid, and now claimed it as set-off in a suit on the written indemnity; it was held a good set-off, as it was a promise by the plaintiff to remain liable for and pay a debt for which he was already liable and was consequently not a guaranty; *semble* that on this new consideration the defendant took the lease.(r) One B., being

Promise to pay a debt resting on the promisor's land.

(p) *Marshall v. Cobleigh*, 18 N. H. 492. In a case in the Exchequer the Statute of Frauds was held to apply to a promise by certain new part owners of a ship, that if the plaintiff, a broker, who had got from the previous owners the right to collect the freight and thereout pay himself his commission, would give up this right to the defendants, they would pay his commissions; whether he had a lien on the freight for his commissions was not decided. *Semble* the part as to the Statute of Frauds is *dictum*; *Gull v. Lindsay*, 4 Exch. 51.

(q) *Plummer v. Lyman*, 49 Me. 232.

(r) *Rexford v. Brunell*, 1 N. Y. Leg. Obs. 398 (N. Y. C. P.). In a statutory action to reinstate a judgment the de-

fence was, that one B. had bought land from the defendant subject to the above judgment, and that the plaintiff had verbally undertaken, together with B., that the plaintiff should release the judgment, and that the defendant should convey to B. the land unencumbered, and that B. should pay the plaintiff the amount of the judgment out of the purchase-money, it was held that this was on the defendant's part a promise to pay his own debt; that the verbal contract was not within the Statute of Frauds; that the judgment was effectually discharged by this contract, and that, therefore, the defendant was not liable; *Besshears v. Rowe*, 56 Mo. 502, citing cases.

occupant of land either under the defendant or as mortgagor, and the taxes having been charged to B., the defendant asked to have the taxes recharged so as to show what was his proportion, and promised to pay them, the Statute of Frauds was held not to apply.^(s) A promise to pay taxes as part of the price of land is good by parol.^(t) Where the defendant had a mortgage on certain property requested the plaintiffs, who were insurance agents, to insure it, and the latter for a series of years paid the premiums, they, the plaintiffs, can recover the amount so paid.^(u) Where the plaintiff had made a special arrangement by which he was to set up a machine in the mill of M. & D., and from the work on the machine was to have the profits till he was repaid the current and past due wages owed to him by M. & D., and the price of the machine; and the defendant bought the mill from M. & D. subject to this arrangement, it was held not to be a guaranty within the Statute of Frauds.^(v) Where the defendant agreed that a certain judgment recovered against him by the plaintiff as surety for S. & Co. should stand as security for a new debt of the same principal to the plaintiff; *semble* that the Statute of Frauds does not apply, the court saying: "It is not directly a promise to pay the debt of another, but an agreement; stating that property already pledged for one debt shall remain pledged for another. Although the ultimate effect is that the debt may be paid, yet the immediate object is merely to appropriate the fund in a different manner."^(w) A promise by the vendee of a farm to pay as part of the purchase-money a judgment against the vendor, which was not (though supposed by the parties to be) a lien on the land, is not a guaranty or within the Statute of Frauds.^(x) Where property belonging to C. was relinquished by the plaintiff upon the agreement that the defendant should guarantee C.'s debt, and the corporation of which the defendant was head got the direct

(s) *Burr v. Wilcox*, 13 Allen, 273.

(v) *Clark v. Waddell*, 16 U. C. Q. B.

(t) *Preble v. Baldwin*, 6 Cush. 549; 352.

Brackett v. Evans, 1 id. 79.

(w) *Macrory v. Scott*, 5 W. H. & G.

(u) *Cramer v. Warren*, 15 N. Y. 914; 20 L. J. N. S. Ex. 90.

Week. Dig. 134 (S. C. N. Y.).

(x) *Miller v. Turnbach*, 7 Luz. Leg. Reg. 8 (C. P. Luz. Co. Pa.).

benefit of this relinquishment, inasmuch as C. was enabled by the free use of his property to go on with work which he was doing for the corporation, in which work he used the property which had been subject to the lien, it was held that the Statute of Frauds did not apply, the court relying upon the fact of the plaintiff's forbearance as a sufficient reason for their decision. This very questionable ruling will be considered elsewhere also. (y) Where the plaintiff had a lien on certain land of K. C. H., on which the defendant held a mortgage posterior to the plaintiff's lien, the plaintiff agreed to forbear their claim, and paid certain costs in connection therewith on the defendant's promise to pay the claim, which the plaintiff had against K. C. H. It was held that as being a new contract on a valuable consideration, it was not within the Statute of Frauds. (z) Land being bound by a lien for purchase-money evidenced by two promissory notes, an oral promise by a subsequent vendee of the land to pay this amount upon the lien being discharged, and a deed made to him, is valid under the Statute of Frauds. (a) Where the de-

(y) *Spooner v. Dunn*, 7 Ind. 81, doubted in *Luark v. Malone*.

(z) *Hodgkins v. Heaney*, 15 Minn. 194. In a Montana case it was said that if a creditor has a lien upon certain property of the debtor to the amount of his debt, and a third person, who also has an interest in the same property, promises the creditor to pay the debt, in consideration of the creditor relinquishing his lien, this promise is not within the Statute. The plaintiffs gave up a lien against a mining ditch, relying on the defendant's guaranty; the defendant owned part of the ditch, or had a claim against it. Whether the claim was a lien or not did not appear; *Carothers v. Connolly*, 1 Mont. 436. Where the defendant, as agent for the plaintiff, lent \$650 belonging to the plaintiff's principal to one J., and took a deed of trust of certain land of J. as security, which

land had a prior encumbrance thereon, and afterwards the defendant bought such prior security, and promised the plaintiff that if he would buy in the land, he, the defendant, would pay the \$650, the Statute of Frauds did not apply; *Hale v. Stuart*, 76 Mo. 21.

(a) *Hodgkins v. Jackson*, 7 Bush, 343. Where there was a lien or claim upon property in which the defendant had an interest, and it was a benefit to him that no proceedings should take place on the mechanic's lien held by the plaintiff, whilst his ejectment was in progress. The consideration, therefore, as regarded the defendant, of his promise, was the benefit or advantage to himself arising from the plaintiff relinquishing proceedings upon his mechanic's lien. The consideration did not proceed from or to the debtor, but was an entirely new and fresh one between the defendant and plaintiff,

defendants, unsecured creditors of J. R., induced the plaintiffs, who were mortgagees of J. R., to allow them to have a second mortgage on the land, and promised J. R., in consideration therefor, to pay an unsecured debt he owed the plaintiffs, and this promise was communicated to the latter, who, in consideration thereof, permitted J. R. to make a mortgage to the defendants, who took possession of the land thereunder, action will lie; and the Statute of Frauds is no defence.(b)

§ 138. The commonest example of an encumbrance assumed in an oral contract by the person interested in the property upon which the charge rests, is that of a guaranty of a mortgage by the purchaser of the land or chattel subject thereto. Such an engagement is not within the Statute of Frauds, and the purchaser may by word of mouth bind himself personally to pay the mortgage debt.(c) If the original mortgagor is discharged, the contract is a novation, and on that ground not within the Statute of Frauds.(d) An assignment, by which the assignee of a vendee of land shall give his notes for the price, and that the note of the vendee shall be surrendered by the vendor, which is done, and that the assignee shall take, subject to the lien of the mortgage, and that his notes were not to be payment, can be shown under the Statute of Frauds, and the mortgage be foreclosed before the last note is due.(e) Where one promises to

and was a new, original, binding contract; the defendant's object being not to answer for the debt of B., but to subserve a purpose of his own; and it was held, therefore, that the Statute of Frauds did not apply; *Arnold v. Stedman*, 45 Penn. St. 188; as to a mechanic's lien coming within the guaranty clause of the Statute of Frauds when the owner promises to answer for his contractor, see *Phill. Mech. Liens*, § 213.

(b) *Fleming v. Easter*, 60 Ind. 402. Where an attorney for an executrix gave up to her some deeds on which he had a lien for his bill, the executrix was liable on a promise to pay the attorney's full bill as well for services for

the intestate as for those rendered the executrix; *Hamilton (Duchess of) v. Inledon*, 4 Bro. P. C. 4; 5 Vin. Abr. 279, pl. 53.

(c) *Wormouth v. Hatch*, 33 Cal. 127; *McDill v. Gunn*, 43 Ind. 320; *Lamb v. Tucker*, 42 Ia. 118; *Pike v. Brown*, 7 Cush. 136; *Fiske v. McGregory*, 39 N. H. 414; *Hoysradt v. Holland*, 50 id. 434; *Huyler v. Atwood*, 26 N. J. Eq. 505; *Ketcham v. Brooks*, 27 N. J. Eq. 347; *Ely v. McNight*, 30 How. Pr. 101; *Burke v. Gummy*, 49 Pa. St. 519; *McClellan v. Sandford*, 26 Wis. 609.

(d) *Bowen v. Kurtz*, 37 Ia. 241.

(e) *Verner v. Johns*, 15 Shand, 613.

pay his own debt to a third party, to whom his creditor is indebted, or where he purchases property subject to an encumbrance, and as a part of the purchase-money agrees to pay the mortgage debt, he will be liable, and the promise is not within the Statute.(f) The promise may be made after a deed for the land has been accepted.(g) A grantee who took under a

(f) *Berkshire v. Young*, 45 Ind. 467, citing cases. So where the plaintiff sold land to S., and took his notes for the price, secured by mortgages of the land, and S. sold to the defendant on condition that the latter would pay the notes which he agreed to do by parol; *Helms v. Kearns*, 40 Ind. 129.

(g) In *Murray v. Smith*, 1 Duer, 429, it was said that "the defendant, upon the conveyance to him, did not assume the payment of the mortgage. The mortgage was a lien upon the land, and his grantor was personally liable upon his bond for the mortgage debt, but the defendant did not become personally bound to pay the mortgage. After the defendant had taken the conveyance default was made in the payment of interest, the principal sum by the terms of the mortgage became due at the option of the mortgagees. The defendant thereupon verbally agreed with the mortgagees that if they would not exact payment of the principal, or foreclose the mortgage, and would give time for the payment of the interest then due, he would, when the next instalment of interest became due, pay the interest then in arrear, together with that which should accrue to that time. The mortgagees assented to this arrangement, and took no proceedings to collect the mortgage debt or interest during the time specified in the agreement. This action is brought upon the defendant's promise to pay the two instalments of interest; and the only question is whether the undertaking on the part of the defendant was to

answer for the debt, default, or miscarriage of another.

"But the defendant's promise was not a promise to answer for the debt of another, within the meaning of the Statute. When it was made, he had the legal title to, and possession of the mortgaged premises. The mortgage had been reduced several thousand dollars by payments, and the defendant, by virtue of his ownership of the land, presumptively had an interest to protect it from sale or foreclosure. He was enabled by virtue of the agreement to take and control the rents and profits of the land during the time specified therein, and the plaintiffs meanwhile forbore to enforce their rights as mortgagees. The consideration of the defendant's promise was one running directly to him from the promisees. The agreement was entered into by the defendant for his own benefit, for the purpose of protecting his interest in the property covered by the mortgage. It was an arrangement with the lienors, for delay in enforcing their lien on the defendant's land.

"And when the purpose of the promise is to secure a benefit to the promisor, by relieving his property from a lien, or securing and confirming his possession, the promise is original and not collateral, although a third person may be personally liable for the debt, and the promise may be in form a promise to pay such debt, and although the performance of the promise may result in discharging the debt;" *Prime v. Koehler*, 77 N. Y. 93.

deed, subject to a certain mortgage on the land, orally promised to pay it, the language of the deed did not make him liable, but the oral agreement did, the latter was held to be no contradiction of the deed.^(h) An oral promise by the vendor of land subject to a mortgage which was an apparent encumbrance thereon, that if the vendee would procure a decree declaring the mortgage paid and cancelled the vendor would reimburse him his outlay in so doing, is not within the Statute of Frauds.⁽ⁱ⁾ Where the defendant, the mortgagee of land, took the possession of it surrendered to him by D., the mortgagor, and he, the defendant, sold it to the plaintiff, and promised to relieve the latter from the encumbrance, the note secured by the mortgage having already been assigned to a third party. D., the mortgagor, made a conveyance to the plaintiff under this arrangement; it was held that neither the land nor the guaranty clause of the Statute of Frauds applied; the encumbrance was not land, and taking up the mortgage did not involve paying D.'s note.^(j) The grantee of land "under and subject" to a mortgage cannot set up the Statute of Frauds as a defence, because the promise is made to the debtor.^(k) Where the defendant desiring to buy land, which could not be sold without a mortgagee's assent, promised the plaintiff, who was assignee of the note secured by the mortgage to pay the note, and the plaintiff in consideration thereof assented to the sale, the court said: "The promise alleged was not a mere promise to pay the debt of another, but it was a new and original promise for a valuable consideration to pay certain specific sums of money for which another person was also liable. This was not a collateral promise, and for that reason invalid. The leading purpose of the promise was to secure to the party making the promise a benefit, which he did not before enjoy, accruing immediately to himself. Such a promise is not within the Statute."^(l) An oral promise by a

(h) *Taintor v. Hemmingway*, 18 Hun, 460.

(i) *Ely v. Bardin*, 12 N. Y. W. Dig. 206 (N. Y. S. C.).

(j) *Green v. Randall*, 51 Vt. 71.

(k) *Pike v. Brown*, 7 Cush. 136; see *Moore's Appeal*, 88 Pa. St. 450.

(l) *Draper v. Putnam*, 7 Allen, 174.

Where the plaintiff was the vendee from J. J. of forty acres, part of a

vendee to pay a mortgage on land is good, though the vendor covenanted that the property was free of encumbrance.(m)

§ 139. The acceptance of a deed-poll which stipulates for the assumption of a mortgage on the land by the vendee may bind the latter personally, notwithstanding the Statute of Frauds.(n) And though there may be a subsisting liability for the same matter in a third person.(o) So accepting a deed with a clause assuming payment of a note secured by a mortgage on the land, makes the vendee liable to a holder of the note.(p) The promise is an implied one, and should be enforced by an action of assumpsit,(q) and the obligee of the engagement answered for, though a stranger to the guaranty, may sue.(r) And it has been said, that "especially will this right to bring suit in his own name exist in behalf of him for whose benefit the promise was made, where the consideration of it was money or property simultaneously delivered or sold to the promissor. In such case the property is received under a trust, which will itself form a good consideration, enuring to the benefit of him

Assump-
tion of
mortgage
provided
for in a
deed-poll,
etc. etc.

larger tract of a hundred and sixty acres, the mortgage on the whole tract was foreclosed by N. L., the mortgagee; pending the period of redemption J. J. sold one hundred and twenty acres (i. e., 160-40 = 120) to the defendant, who verbally agreed as part of the consideration to relieve the forty-acre tract of the lien of the N. L. mortgage, it was held that the verbal agreement was valid, the agreement on the defendant's part was to do what J. J. was bound to do, i. e., protect Austin J. Jordan, the plaintiff, against a mortgage in ignorance of which he had bought; no reference, however, was made to the Statute of Frauds; Jordan v. White, 20 Minn. 99.

(m) Wilson v. King, 23 N. J. Eq. 152.

Where W. and P. agreed to exchange lands, W.'s being encumbered, P. borrowed on mortgage from L. enough to

make the encumbrance on his estate equal to that on W.'s. In the deed from P. to W. it was stipulated that W. should pay off the debt to L. It was held that this was a claim superior to W.'s homestead right, and that the Statute of Frauds was no defence; that W. had accepted a deed binding him to pay the amount, and that the suit was to follow this trust; the mortgage to L. was by a sort of deed of trust; Monroe v. Buchanan, 27 Tex. 247.

(n) Goodwin v. Gilbert, 9 Mass. 510; Murray v. Smith, 1 Duer, 429, citing cases.

(o) Goodwin v. Gilbert, *supra*.

(p) Fitzgerald v. Barker, 70 Mo. 687.

(q) Urquhart v. Brayton, 12 R. I. 170, citing cases.

(r) *Ib.*, saying there had been some conflict of authority.

to whom the payment is due; and if the purchaser has received credit for the sum thus contracted to be paid to such other person, the law will treat it as money had and received to his use.”(s) So it has been held that the acceptance of a deed, which in terms provides that the grantee shall pay off a certain encumbrance, is an undertaking by the grantee to pay the encumbrance, and an undertaking which may be appropriated by the holder of the encumbrance, and upon which he may maintain an action.(t) So it has been said that the grantee of a deed-poll, which imposes upon him the obligation to pay a mortgage on the land, and to save the grantor harmless therefrom, can be sued by the mortgagees, and the Statute of Frauds is no defence, though he had never signed the deed-poll, and that the Statute does not apply to deeds-poll.(u) A mortgagee can sue on an oral promise made by the vendee to the vendor to pay the mortgage as part of the price.(v) Where the plaintiff sold land to E. S., and took notes for the price, and E. S. sold to the defendant, and in the deed it was recited that the notes had been given the plaintiff, and also in the deed it was stipulated that the defendant should pay the notes, the superior court of Cincinnati said that it was true that the plaintiff was “named in the clause of the deed, stating the assumption to pay the notes and mortgage; but it is stated that they were made to her by name, so that it is substantially a covenant to pay to her; and under our code all difficulty on the ground of the plaintiff’s right to maintain the action growing out of the terms of the instrument, would seem to be at an end; the covenant is for her benefit.”(w) In a New York case it was said that an oral agreement between the mortgagor and the defendant, the mortgagee of land, that the mortgagee shall pay off other mortgages on the premises, does not pass to the plaintiff who afterwards, without the knowledge of this agreement, received a conveyance of the land subject to the defendant’s mortgage.(x)

(s) *Lee v. Neuman*, 55 Miss. 373.(w) *Cushman v. Garrison*, 2 Cinc.(t) *Schmucker v. Sibert*, 18 Kan. 104.Sup. Ct. Rep. 146; see *Garnsey v. Rogers*, 47 N. Y. 241.(u) *Foster v. Atwater*, 42 Conn. 250.(x) *Miller v. Winchell*, 70 N. Y.(v) *Ruhling v. Hackett*, 1 Nev. 369. 439.

Where A., owner of mortgaged premises, but not the person who had created the mortgage, nor, as far as the evidence showed, in any way personally liable for the mortgage debt, conveys to B. and C. the premises in question, subject to the mortgage reciting in the deed that B. and C. were to assume the payment of the mortgages, and pay them as part of the consideration of the conveyance; it was held there was no writing signed by the vendees under which they could be made liable for the deficiency on a failure to obtain on a foreclosure of the mortgaged premises the full amount of the mortgage debt.(y)

§ 140. The next question for consideration is the difficult one as to how far a contract to pay for labor or materials furnished by the plaintiff, the benefit of which has accrued to the defendant's property, is a promise to pay for a debt resting on such property. There is a line of decisions which go far to establish that such a promise is not within the Statute of Frauds. Thus, where the defendant purchased the property, with all the advantages and avails of the plaintiff's labor, before the term of his labor had half expired, and agreed with the vendor in consideration to pay the plaintiff for that portion of his work which he had already performed, the plaintiff to continue and complete the term of his labor; this is not a case affected by the Statute of Frauds. It is the promise of one deriving a benefit by means of the undertaking, and having funds placed in his hands for the payment of the indebtedness, which he promises, in consideration

Promise to pay for labor or material which has benefited the defendant's property.

(y) *King v. Whitely*, 10 Paige, Ch. 465. In another New York case it was held that the assignee of a lease is not bound by a verbal promise to personally assume a mortgage on the premises, because the Statute of Frauds applies; the mortgage was, *semble*, of the fee, and was made by a third party and already on the premises; *Goelet v. Forley*, 57 How. Pr. 174. Where a purchaser of chattels, subject to two mortgages, promised in consideration of forbearance to pay the debt secured by the first mortgage, the Statute of Frauds was held to apply; but where the purchaser procured by this arrangement the mortgage to be assigned to a third person and himself, bought in under a foreclosure, it was held that in favor of the second mortgagee, one of the parties to the original assignment, the first mortgage will be regarded as extinguished; *Doolittle v. Naylor*, 2 Bosw. 224.

thereof, to discharge.(z) Where the plaintiff, at the defendant's request, continued to carry out a contract which he had with one T., the defendant having bought T.'s interest and having promised to pay the plaintiff according to T.'s contract (not to pay T.'s debt); this was held to be a new contract on a new consideration.(a) Where the defendant, who was interested in a work to which the money raised by a certain note was to go, promised to sign a note and pay it, but defended on the ground that the promise was a guaranty being for the debt of S., who was carrying on the work in question; it was held that as the money so raised was to go

(z) *Huber v. Ely*, 45 Barb. 170, citing cases. Where the defendant employed one C. to dig a cellar on his, the defendant's, premises, and C. hired the plaintiff to do the work, after doing one day's work the plaintiff went to the defendant and declined going on unless the latter would promise to pay him; the defendant told him to go on and that he should be paid; it was held that the work being on the defendant's property, and for its benefit, the defendant's promise was an original one, and not collateral to his liability to pay the plaintiff, and that, therefore, the Statute of Frauds did not apply; *Devlin v. Woodgate*, 34 Barb. 257.

(a) *King v. Despard*, 5 Wend. 279. Where one S. was, *semble*, the owner of land and the defendant a third mortgagee, who had wanted money to buy in the property at the foreclosure sale under the prior encumbrance, and did so buy, but afterward refused to take the loan or pay the plaintiffs for their services in obtaining it, and in investigating the title, the court said in this case the evidence shows that the defendant agreed to take a loan which had been negotiated for one S., and to pay the expenses incurred by the plaintiffs in searching the title to the

premises on which the loan was to be made, and also to pay for the services rendered by the plaintiffs. It is true that S. was liable to the plaintiffs, but the defendant assumed the responsibility which had accrued in consideration of the transfer to him of the subject matter of such liability, and was, by his arrangement with the plaintiffs, to receive the entire benefit of such expenditure as had been made, and such services as had been performed for S. The consideration of the promise by S. was the loan, and such was also the consideration of the promise by the defendant. It was a new promise to the effect that if the plaintiffs would transfer the loan to him he would pay them the same charge that they would receive from S. had the loan been made to him. Not only was that the agreement, but the defendant also promised to pay \$25 for such services in addition as would be necessary to make the transfer in due form to secure the mortgagee. The money was ready and was kept in abeyance awaiting the convenience of the defendant and subject to his order. This was a further consideration for the promise, and it was held that the Statute of Frauds did not apply; *Benedict v. Dunning*, 1 Daly, 242.

to the defendant, who was to disburse it for the work for which he was to have security, the Statute of Frauds was no defence, though the defendant was to pay the money to S.(b) Where the defendant was owner, and a third person principal contractor, and the plaintiff a sub-contractor, the defendant also assuring the plaintiff that he would be owing the principal contractor and would retain these funds to pay the plaintiff, the Statute of Frauds did not apply, though the defendant denied having the funds.(c) Where the plaintiff, under a written order of the defendant to deliver to S., to be used on the defendant's house, a hundred dollars' worth of lumber, delivered by mistake a hundred and sixty dollars' worth, and the defendant knowing of this promised to pay for it, the Statute of Frauds does not apply.(d) Where the defendant, owner of property, who employed a housewright to build for him a house upon it promises the plaintiff that if he will furnish material to the housewright he, the defendant, will not settle with the latter without giving notice to the plaintiff so that he may secure his debt by attachment, it was held that the promise was not a guaranty within the Statute of Frauds.(e) Where the original debtors were not looked to at all after the new agreement, and where the promissor got the benefit of the work and material on his property, there was all the more reason for the Statute of Frauds not applying; the promisees had worked for the defendant's contractor, and afterwards directly for the defendant.(f) Where the owner of a building promised to pay for material furnished and charged to his contractor it was held that if the promise was on a consideration moving to the promissor, and the plaintiff's claim was a lien on the defendant's building, the promise was not within

(b) *Potter v. Brown*, 35 Mich. 279; being relied on; *Wait v. Wait*, 28 Vt. see *Pool v. Wedemeyer*, 56 Tex. 299. 351.

(c) *Hiltz v. Scully*, 1 Cinc. 557.

Where the defendant received a conveyance of the property of the person answered for, and promised to pay for a barn thereon put up by the plaintiff, the Statute of Frauds was held not to apply, the "funds" rule (see § 39)

(d) *Smith v. Mayo*, 1 Allen, 160.

(e) *Towne v. Grover*, 9 Pick. 307; see *Lomax v. McKinney*, 61 Ind. 378; see, however, *Curtis v. Brown*, 5 Cush. 491.

(f) *Schoenfeld v. Brown*, 78 Ill. 489.

the Statute of Frauds, though the debt previously had not been the defendant's personal debt.^(g) Where there was a contract between the plaintiff, a mechanic, and the defendant, the owner of the premises, for the repair, etc., of the latter, with the permission of a tenant in possession, was held original, and not a guaranty within the Statute of Frauds, though other work was done for the tenant and by him paid for.^(h) The defendant, an owner of land, S., his contractor, making a house for him, and the plaintiff, who was furnishing S. with labor and material, agree that the defendant shall pay the plaintiff directly out of what he, the defendant, should owe S., it was held that the Statute of Frauds did not apply.⁽ⁱ⁾

§ 141. The following cases are based on other principles than the one now under consideration. Thus, where H. & S. before finishing certain machinery for the defendant, assigned their contract and materials to the plaintiff, it was held that a promise to pay the price to the plaintiff was not within the Statute of Frauds, because the defendant, and not H. & S., was primarily liable.^(j) Where the defendant ordered U. L. to do certain work on the property of A. B. and promised to be accountable, and U. L. employed the plaintiff, A. B. was charged in the plaintiff's books; it was held, nevertheless, that A. B. was not liable, and that the defendant was, his promise not being a guar-

^(g) Landis *v.* Royer, 59 Pa. St. 98; see as to mechanic's lien, Phill. on Mech. Lien, § 213, and index "Statute of Frauds."

^(h) Vandegrift *v.* Cassidy, 1 W. N. Cas. 319, S. C. Pa. Where the subcontractor refused to go on, and the principal contractor was confessedly insolvent, a verdict holding the principal owners of houses on which the plaintiffs had been at work, liable on their oral promise to the plaintiffs to pay them all that was due if they would continue work, was sustained; Merriman *v.* McManus, 13 W. N. Cas. 157, S. C. Pa., relying on Jefferson Co. *v.* Slagle, 66 Pa. St. 202.

⁽ⁱ⁾ Estabrook *v.* Gebhart, 32 Oh. St. 420; see Consoc. Presb. Soc. of Green's Farms *v.* Staples, 23 Conn. 557; Packer *v.* Benton, 35 Conn. 349. Where a vendor conveys, reserving a lien for the price, and the vendee improves and gives his mechanics a note for the cost of the latter, and reconveys to the vendor, who promises to pay the note, the mechanic can enforce his claim against the vendor by a lien, not merely against the enhanced value of the land, but, notwithstanding the vendor's lien, against the whole value; Adams *v.* Russell, 85 Ill. 287.

^(j) Oldfield *v.* Lowe, 9 B. & C. 77.

anty.(*k*) Where the plaintiff refused to furnish further material to one A., who was building boats for the defendant, and the latter promised that if the plaintiff would furnish timber sufficient for the boats, and get an order from A., he, the defendant, would pay for the timber, the Statute of Frauds was held not to apply.(*l*) Where a contractor agreed to do a prescribed work for L., and employed laborers to work upon it at his own credit; that the work might not stop, L., with the consent of the contractor, promised the laborers, that if they would continue to labor, he would pay their wages for the past as well as for the future; provided, the funds in his hands, belonging to the contractor, should be sufficient; it was held, the promise was not within the Statute of Frauds, or without legal consideration.(*m*) Where the defendant's contractor employed the plaintiff and abandoned the contract with the defendant's consent, leaving money enough with the latter to pay the plaintiff's claim; the defendant promised the contractor and afterwards the plaintiff to pay the claim; it was held that the Statute of Frauds did not apply, as there was an implied obligation upon the defendant, as well as an express one, and as there was a new consideration.(*n*)

§ 142. The following cases raise some doubt as to the rule itself, that a promise to pay for goods furnished to the promissor's property is not a guaranty. Thus The rule doubted. where the defendants agreed with one C., who was building houses for them, that he should release them from the contract, assign them the material on the premises, and they would pay the bills for the work and material, it was held that the Statute of Frauds applied. Whether the land on which the unfinished houses stood were, with the houses

(*k*) *Brown v. George*, 17 N. H. 129.

(*l*) *Rounds v. May*, 35 U. C. Q. B. 368. Where an employé getting out timber for one M. continues to do so for the defendant, M.'s assignee, relying on a promise of the latter to pay him as well for that work as for what M. owed him; it was held that the Statute of Frauds does not apply to either promise

as a guaranty, there being a new and original consideration of benefit to the promissor; *Tumblay v. Meyers*, 16 U. C. Q. B. 145; see *Laing v. Henry*, 54 N. H. 59.

(*m*) *McKeenan v. Thissel*, 33 Me. 368. (The report only gives a syllabus.)

(*n*) *Cock v. Moore*, 18 Hun, 32.

themselves, the property of the defendants, does not appear; the defendants under the agreement finished the houses. The court also said that the original liability of C. was not extinguished, and there was no surrender by the plaintiff of a lien.(o) Where the owner of a lot of ground orally promised to pay for materials furnished to M., who was building a house on it, which lot and house he, M., agreed to buy from the defendant, the Statute of Frauds was held to apply.(p) It has been held that a parol promise by the owner of a building to pay a debt due by the contractors, who built it, to a mechanic, if the latter will obtain an order from the contractors to whom, however, the promissor owed nothing, is within the Statute of Frauds.(q) Where the jury found that a sub-contractor was not an agent of the defendant, that agreements between his employes and himself were made with him personally, that the debts in suit were incurred on his credit and engagement, and not on account of the defendant, a promise by the latter to pay such debts would be a guaranty, and within the Statute of Frauds.(r) Where a sub-contractor, not paid by the principal contractor, gives up work, but resumes it on a guaranty of the owner, and still looks to the contractor, the owner's liability is that of a guarantor, and within the Statute of Frauds.(s) Where the defendant promised to pay the

(o) *Curtis v. Brown*, 5 Cushing, 491, citing and considering many cases.

(p) *Loonie v. Hogan*, 5 Seld. 441.

(q) *Pike v. Irwin*, 1 Sandf. 15.

Where the owner of land was sued by an employé of H., his building contractor, the court, citing a dissenting opinion below, said that it proceeded upon the ground that, because the mill was built upon the land of the defendant and became his property when built, he received the consideration for the promise; and that, therefore, it is not within the Statute. We have already seen that this does not determine the question. It must further be ascertained whether the defendant made a contract with the plaintiff to complete the mill for him

and undertook to pay him therefor, or whether his promise really was that he would become surety that H. should pay the plaintiff for the work; *Brown v. Weber*, 38 N. Y. 191.

Where one S. contracted to build for the defendant a house, and the plaintiff furnished S. with brick; when it was delivered the defendant promised the plaintiff to retain enough money due to S. to pay for the brick, and upon this arrangement, repeated several times, the defendant relied; it was, nevertheless, held that the Statute of Frauds was a good defence in the case; *Weyer v. Beach*, 14 Hun, 237.

(r) *Barden v. Briscoe*, 36 Mich. 256.

(s) *Bresler v. Pendell*, 12 Mich. 227.

plaintiff out of moneys which he, the defendant, might owe V. on a house which V. was building for him, the defendant; it was held that the Statute of Frauds applied, as V. was looked to, and as the defendant was only to pay as he might owe V. (t) L. had a contract for carrying the mail, and contracted with Newell to carry it. L. transferred to Ingraham the right to receive a part of the money from the post-office due him, reserving to Newell a portion. Ingraham requested Newell to carry the mail for him, and promised to see him paid. The contract between L. and Newell remained uncanceled. The promise of Ingraham to Newell was held to be within the Statute of Frauds, as it was collateral and ancillary to L.'s, and as there was no new or independent consideration. (u) See on this subject the previous sections indicated in the note below. (v)

§ 143. The lien or other charge may be on personalty, as where a vessel is released in consideration of the guaranty being given. (w) So a promise by the mortgagee of a chattel to pay for its repairs, under which promise the mechanic gives up his lien, is not within the Statute of Frauds, as the promisor has an interest in the property. (x) So where the plaintiff forbears to foreclose a chattel mortgage against M., thereby enabling him to prepare and deliver the goods which he, M., had sold the defendants, a promise of the latter to answer for M.'s debt assented to by both the other parties is not within the Statute of Frauds. (y) Where a purchaser, in order to get

Promise by debtor to pay a debt resting on his personal property.

(t) *Ware v. Stephenson*, 10 Leigh, 155, relying broadly on the "continuous liability of the third party," test.

(u) *Newell v. Ingraham*, 15 Vt. 422.

(v) See §§ 48, 72 and n. (b), 73 and n. (i), 74 and nn. (v, x, and b), 87 and n. (f), 92, 93.

(w) *Doane v. Newman*, 10 Mo. 69; *Monroe v. Hart*, 3 N. Y. Week. Dig. (N. Y. S. C.) 34 (the promisor was mortgagee of the vessel); *Barker v. Guillian*, 5 Ia. (Clarke) 512.

(x) *Conradt v. Sullivan*, 45 Ind. 181.

(y) *Calkins v. Chandler*, 36 Mich.

321; see *Richardson v. Robbins*, 124 Mass. 107, where the Statute of Frauds applied because the defendant had no interest in the goods. In a Kentucky case, one Lucas was defendant and Chamberlain plaintiff, and Lucas was surety on a replevin-bond in a judgment against S., and execution on the bond had gone against Lucas's property; Chamberlain, at the latter's request, became surety on an injunction bond, whereby Lucas's property was released, and Lucas promised to indemnify him. Chamberlain had to

goods bought by him, promises, as part of their price, to pay the plaintiff's debt, the Statute of Frauds does not apply.(z) A lien acquired by an execution, and surrendered in consideration of the guaranty, is a very common case.(a) A promise by one whose goods were levied on to pay the proceeds of the goods when sold, made by the promissor to the one making the levy, and upon condition that the levy should be released, is not within the Statute of Frauds if the levy was valid, but *secus secus*.(b) It is enough that the promissor desires the discharge of the lien, in order to become the purchaser of the goods.(c) There are other kinds of liens, the surrender of which by the promisee will take a guaranty out of the Statute of Frauds: the lien of a laborer, as a lumberman, on lumber brought down by him;(d) the lien of an artificer or

pay the original debt under proceedings under the injunction bond (Lucas had thought that his property levied on was liable for S.'s debt). Chamberlain, by becoming surety on the injunction bond, had ultimately to pay this debt. Lucas's promise was, therefore, to indemnify Chamberlain for becoming surety for a debt for which his, Lucas's, property was liable, and his promise was held not to be within the Statute of Frauds; *Lucas v. Chamberlain*, 8 B. Mon. 276.

(z) *Fergusson v. Kerr*, 5 U. C. Q. B. 261, citing *McDonnell v. Cook*.

(a) *Bird v. Gammon*, 3 Bingh. N. C. 888; *Adkinson v. Barfield*, 1 McC. 575; *Randle v. Harris*, 6 Yerg. 508; *Blackford v. Plainfield Gaslight Co.*, 43 N. J. Law, 439; 4 N. J. Law Journ. 115; *Lightle v. Berning*, 15 Nev. 391.

(b) *Rogers v. Collier*, 2 Bail. 583. The validity of the levy is an important point as shown by the following case:—

Jacob Gheen's estate was sought to be charged by *McBurney & Co.* with a claim as follows: *McBurney & Co.* were

creditors of one C. G., and he having left town, they attached his property on the ground that he was an absconding debtor. Jacob Gheen, in consideration of the surrender to him of the goods attached, promised to pay the debt. *McBurney & Co.* released the goods, and C. G., shortly after returning, took possession of them, and continued his business. The claim was disallowed because of the doubt that the attachment was valid, and whether, therefore, *McBurney & Co.* gave up, or Jacob Gheen received anything, either had a right to hold Jacob Gheen's promise was a guaranty, C. G.'s debt continuing; and it was said that whatever right *McBurney & Co.* had by virtue of their attachment, they lost by the transfer to Jacob Gheen, who, however, took nothing; *Gheen's Estate*, 7 W. N. Cas. 66; S. C. Pa.

(c) *Cross v. Richardson*, 30 Vt. 647.

(d) *McDonnell v. Cook*, 1 U. C. Q. B. 544; *McDonald v. Glass*, 8 id. 245; see *Noble v. Edes*, 51 Me. 34; see *Young v. French*, 35 Wis. 116.

mechanic ;(e) of a carrier for freight.(f) Where a husband is present and assents to his wife's pledging her trunk for the fare of a child who is travelling with her, and then promises to pay the fare if the trunk is forwarded, the Statute of Frauds does not apply.(g) So the lien of the seller,(h) or the lien of a pledgee of securities,(i) as policies of insurance,(j) or government vouchers.(k) So the lien of a court clerk upon papers of record, allowed him to secure his fees.(l) A promise by an attorney-at-law to pay a debt of his principal, if the plaintiff would not attach certain money in his, the attorney's, hands, is good by parol, as the attachment might have put the latter to expense, and even have caused a personal judgment to go against him.(m) So the waiver by a creditor of his right to administer upon his debtor's estate, is such a surrender of a claim or lien as will take the guaranty out of the Statute of Frauds.(n) The acceptance of a draft in consideration that the payee should release a lien claimed on the personal property of the drawer, is not a guaranty within the Statute of Frauds.(o)

§ 144. There is no more vexed question under the law of guaranty than that of the application of the Statute of Frauds to an indemnity to one for becoming surety for another. The point to be ascertained is whether the principle discussed above to the effect that if there is a subsisting liability in a third person any promise answering for such liability is a guaranty applies or not. The subject would have come more properly under the "subsisting liability" head, but was postponed to this place

Indemnity
to one for
becoming
guarantor.

(e) *Houlditch v. Milne*, 3 Esp. 87; *Shook v. Vanmater*, 22 Wis. 535; *Budd Fears v. Story*, 131 Mass. 49; *Siau v. Thurber*, 61 How. Pr. 214.

(f) *New York R. R. v. Gilchrist*, 16 How. Pr. 564; *Wills v. Brown*, 118 Mass. 137.

(g) *Coquard v. Union Depot Co.*, 13 Chic. Leg. News, 266; *St. Louis Ct. App.*

(h) *Fitzgerald v. Dressler*, 7 C. B. N. S. 391; 5 id. 892; 29 L. J. C. P. 113.

(i) *Walker v. Taylor*, 6 C. & P. 753; 490.

(j) *Castling v. Aubert*, 2 East, 330; *Borchsenius v. Canutson*, 100 Ill. 92.

(k) *Winfield v. Potter*, 10 Bosw. 230; 24 How. Pr. 446.

(l) *O'Bannon v. Chumasero*, 3 Montan. 422.

(m) *Hedges v. Strong*, 3 Or. 18.

(n) *Crawford v. King*, 54 Ind. 11.

(o) *Dunbar v. Smith*, 66 Alabama,

in order not to interrupt the continuity of treatment which took up successively the promise made upon the sole credit of the defendant, the promise which guaranteed a subsisting liability; and, lastly, the promise to pay one's own debt. It was better that those cases which came under more than one of these heads, and thus led the discussion insensibly from one branch to the next, should be first considered. The promise of indemnity comes only under the "subsisting liability rule," and may now be discussed. As a general principle it would seem, if A. says to B.: "Become surety for C. to D. and I will indemnify you;" that the duty of C. is clearly to answer to B. for any payment B. may have had to make to D., and if C. fails to do this, that A., under his promise of indemnity, must do so: the promise, therefore, resolves itself into an engagement on A.'s part to answer for C. to B., and there is good authority for saying that an indemnity to one for becoming guarantor is within the Statute of Frauds, because the person answered for owes it to the guarantor to repay him,^(p) if he the guarantor has been called upon, and it is this liability that the indemnitor answers for, and therefore the latter's promise is a guaranty. See § 26, *supra*.^(q) The English cases, as has been said by Judge Byles, are not easy to reconcile.^(r) And unfortunately they are all affected by certain differences, so that no two are precisely in the same plane. In the leading and much disputed case of *Thomas v. Cook* the ruling that an indemnity for a guaranty is not within the Statute of Frauds, while explicitly laid down, is in reality only dictum,

(p) See 3 South. L. Rev. 438.

(q) See *Brown v. Adams*, 1 Stew. (Ala.) 51; *Jones v. Shorter*, 1 Kelly, 294; *First National Bank of Sturgis v. Bennett*, 33 Mich. 524; S. C., S. N., Buck, 14 Alb. L. J. 203; *Bissig v. Britton*, 59 Mo. 206; *Wills v. Shinn*, 42 N. J. Law, 139 (promise of indemnity was given after plaintiff's liability had accrued); *Kingsley v. Balcome*, 4 Barb. 131; *Staats v. Howlett*, 4 Denio, 559; *Baker v. Dillman*, 12 Abb. Pr. O. S. 314; 21 How. Pr., 445, overruling *Chapin v. Merrill*; and citing cases; *Draughan v. Bunting*, 9 Ired. 10; *Eas-*

ter v. White, 12 Oh. St. 219; *Carroll v. Nixon*, 2 Miles, 432 (D. C. Philad'a); the plaintiff was already liable when the indemnity was given. See *Macey v. Childress*, 2 Tenn. Ch. (Cooper) 453; see 3 South. L. Rev., N. S., 431; 1 Sm. L. C. (7th Am. ed.) 510; *Smith, Contr.* (6th Am. ed.), 98; *Will, Saund.* (Sir E. V. W. ed.) i. 234, n.; XXXII. Law Mag. and Rev., 3d ser., 315; see, also, §§ 862 and n. (e), 124.

(r) *Mallett v. Bateman*, 16 C. B. N. S. 543; 10 L. T. N. S., 869; 10 Jur. N. S., 865.

and the decision of the case is correct on another ground, namely, that an oral promise to pay a debt for which the guarantor, as well as the person answered for, is liable, is undoubtedly valid; the defendant had promised to indemnify the plaintiff against all loss if he, *with the defendant* and W. C., would go on a bond to save N. D. M. harmless from the payment of debts due by W. C. and N. D. M.(s) So that, admitting that later decisions, which undertook to reverse *Thomas v. Cook*, were wrong, and the latter case is now good law, it by no means follows that the statement therein sustaining an oral indemnity for a guaranty is anything but an erroneous dictum, given as a reason for a sound decision. The weight of the American decisions is perhaps in favor of applying the Statute of Frauds to these indemnities.(t) A recent and important decision on this subject was made in Missouri, and, while correct in denying the *dictum* of *Thomas v. Cook*, erred with it in ignoring the fact that the indemnitor was bound with the guarantor, but unlike it arrived at an erroneous conclusion, and held that the Statute of Frauds applied. The defendant, who had signed a replevin bond, and was, it would seem, bound, asked the plaintiff to become surety on this bond, and promised to indemnify him therefor.(u)

(s) *Thomas v. Cook*, 3 M. & R. 448, and note; 8 B. & C. 732. See opinion of Williams, J., in *Cripps v. Hartnoll*, 4 B. & S. 419, in which he says that the doubtful ruling in *Thomas v. Cook* was dictum of Bayley, J., in which Lord Wensleydale, the other judge, did not join.

(t) *Marshall v. Cobleigh*, 18 N. H. 492.

(u) *Bissig v. Britton*, 59 Mo. 206, relying on *Winckworth v. Mills*, *Easter v. White*, *Farley v. Cleveland*, *Carville v. Crane*, *Barker v. Bucklin*, *Draughan v. Bunting*, *Simpson v. Nance*, *Brown v. Adams*, and denying *Chapin v. Merrill*, *Smith v. Sayward*, *Jones v. Shorter*, *Dunn v. West*, *Lucas v. Chamberlain*, *Jones v. Letcher*, *Holmes v. Knight*, holding *Chapin v. Merrill* to be over-

ruled in *Kingsley v. Balcome*, and, above all, denying *Thomas v. Cook*, which was said to be overruled in *Green v. Cresswell*. See *Draughan v. Bunting*, 9 Ired. 10, on all fours with *Bissig v. Britton* and *Cripps v. Hartnoll*.

The following note (7 Leg. Gaz., 165), written when the decision of Vice-Chancellor Malins in *Wildes v. Dudlow*, 23 W. R. 435, and that of the Supreme Court of Missouri in *Bissig v. Britton* were first published, may be of interest. Speaking of the contrariety of view shown in the two cases, the writer says: "This inconsistency is a most striking feature of the two decisions. But the fact that they are probably both wrong is more to the purpose. It is fortunate that the source

If there is a last word on this subject, it will be found in Chancellor Cooper's decision in the recent case of *Macey v.*

of mistake is not only simple, but one common to the two cases, for to analyze the authorities on this point within the compass of the present note would be out of the question. *Wildes v. Dudlow*, and *Bissig v. Britton*, irreconcilable in everything else, agree in ignoring a distinction which, sound or not, is perfectly well established in English law, and with remarkable unanimity apply to their purpose decisions predicated on what, in the authorities themselves, is regarded as an entirely different state of facts. To come to the point, *Wildes v. Dudlow* decides that an indemnity to a person for becoming a guarantor in an ordinary case is without the Statute of Frauds, and relies upon *Thomas v. Cook*, 8 B. & C. 728, and *Reader v. Kingham*, 13 C. B. N. S. 344, to support the position. Now as a matter of abstract reasoning, when A. says to B. 'become a guarantor for C. as to his debt to X., and I will indemnify you,' C. assenting to the contract, and B. pays upon C.'s failure to do so, the first person to exonerate B. should be C. A.'s promise of indemnity amounts, therefore, to an engagement to reimburse B. if C. does not, as typical a guaranty as can be imagined. The principle being so plain, one naturally scrutinizing with unusual nicety authorities which are invoked to sanction an opposite result, comes to find that the decisions, with a few exceptions, perhaps (see *Throop on Validity of Verbal Agreements*, § 438 *et seq.*) (among which latter, *Thomas v. Cook*, and *Reader v. Kingham* are not), are distinguishable substantially on three grounds, either that they were cases where the promise held to be without the Statute was an engagement by a person to pay a debt which was really

his own, or were cases of promises made not to the creditor that a certain debt should be answered for, but to the debtor himself (E. saying to F. "if you have to pay that debt of yours to G., I will repay you;," a contract in no way collateral), or lastly were cases of bail. And here we come to the distinction to which Vice-Chancellor Malins and Judge Wagner agree in giving the go-by. To take first the former's decision, we see that he relies mainly on *Thomas v. Cook*, and saying, that though *Green v. Cresswell*, 10 A. & E. 453, overruled it. *Reader v. Kingham* overruled *Green v. Cresswell*, and that *Thomas v. Cook* remains law. The history of these three cases can be succinctly given thus: in *Thomas v. Cook*, the promise was made by A., a surety to B., the promisee, that if the latter would assume and share the suretyship, he, the promissor, would make him whole, and the contract was held not to be within the Statute. The reason being that A., though incidentally guaranteeing that the principal would do his duty, and not allow either surety to be called upon, yet that A., being liable for the whole debt, in getting B. to divide this liability on consideration of indemnifying him, was really promising to pay his, A.'s, own debt. *Green v. Cresswell*, though it said that the reasoning of *Thomas v. Cook* was not satisfactory, did not, in fact, overrule the decision itself (see, however, *Brown on Statute of Frauds*, 145, and *Throop, ut supra*), for the two cases were entirely different. In *Green v. Cresswell*, A., the promissor, asked the promisee, B., to become surety in civil bail for C., a third person, and promised to keep him safe. Here the question of bail before alluded to comes

Childress. The statement of the law given by this judge is almost exhaustive, and is entirely fair and accurate. He finds that the English authorities leave the subject in doubt, and that the American are equally divided, standing eight states to eight. He notes that no two decisions are rested on the same reason; and he quotes Chief Justice Shaw as saying that to be within the Statute of Frauds the promise must be to the creditor, whereas the indemnity is to the debtor; and Carter, C. J., as saying that the indemnity is what the surety relies on for safety, not the outstanding liability of the prin-

up, and the problem was whether there was any liability in the third person to indemnify his surety in a case of *civil* bail. The court held that there was, and therefore that the promise of indemnity was collateral. This liability of C.'s was much doubted (see Leake on Contracts, page 129), and Reader *v.* Kingham, in overruling Green *v.* Cresswell, denied it, and did not, as Vice-Chancellor Malins seems to have supposed, decide that an indemnity for becoming a mere guarantor was without the Statute of Frauds.

It is apparently settled in England (see cases already cited, and Leake, *ut supra*) that promises to indemnify one for becoming a bailman, either in a criminal or a civil proceeding, are not within the Statute, there being no liability on the party bailed to keep his bailman whole, and, therefore, the indemnitor's promise to the latter being collateral to no other subsisting liability is not a guaranty.

Whether this doctrine of the non-liability of a party bailed is correct or not (see Throop, § 448, n.) is of no importance in this connection. It has been established in England, and, therefore, to apply to contracts of indemnification against an ordinary guaranty decisions based upon the assumption that, in the party answered for, there was no liability to which the

promise to indemnify could be collateral, so as to argue that, because the latter are without the statute, the former must be, is absolute perversion of authority. We have seen that Green *v.* Cresswell and Reader *v.* Kingham leave the original position of Thomas *v.* Cook untouched; and, therefore, must conclude that the principal case, Bissig *v.* Britton, which is identical with it, is wrong in relying on Green *v.* Cresswell, which, besides being overruled itself, never in reality overruled Thomas *v.* Cook, owing, as has been said once already, to the fact that being a case of bail it was not in the same plane with the latter decision. See 13 American Law Register, 721, December, 1874, for a collection of American cases supporting Thomas *v.* Cook, and as distinguishing those cited in favor of the view taken by the vice-chancellor in Wildes *v.* Dudlow, above. It is fair to say that Mr. Throop (Validity of Verbal Agreements, § 474) regards the weight of authority as being rather to the effect that an indemnity against loss sustained by the promisee's having become a guarantor, is without the Statute of Frauds. See, also, Byles on Bills, *246, and 3 Pars. Con. (5th ed.), 22 n.; *contra*, 1 Sm. Lead. Cases, 477-8; Browne on Stat. of Frauds, § 158 *et seq.*; Smith on Contr., p. *49, Mr. Rawle's note.

cipal; and the Kentucky courts as going on the ground that the right against the principal arises from the payment of the debt, and does not exist when the indemnity was made; and adds that Vice-Chancellor Malins's remark, that the principle is plain, is as good a reason as any of the others. Finding the question open the chancellor of Tennessee decides that the Statute of Frauds applies; on a real difficulty of the case, which he had apprehended from the outset, he had his doubts, and as the principal not having requested the surety to become such; the chancellor was not sure whether the liability of the principal to reimburse the surety did not first arise after the debt was paid, and so overruled a demurrer setting up the Statute of Frauds, and decided to hear proof; but finally (2 Tenn. Ch., p. 453) decided the proof to be insufficient to hold the indemnitor, saying that, "as it seems to me, where one person becomes surety for another at the latter's request, and for his benefit, the request necessarily implies a promise of indemnity; and if another person unites with the first in the request, and makes an express promise to indemnify the surety, his promise must necessarily be within the Statute, because collateral to the implied promise of the principal. And as it also seems to me, this result is not changed by the fact that the promise of the principal does not result from a request by him that the surety should become bound as such, but results by operation of law from the existence of the relation of principal and surety. The obligation of a principal to indemnify his surety, like the obligation of co-sureties to each other, stands upon a principle of equity, and dates from the creation of the relation." The facts of the case were as follows: The alleged promise was by the maker of a trust assignment for creditors, that if the promisee would become surety for the trustee's faithful performance of his duties, he, the promissor, would hold him, the promisee, the surety for the trustee, harmless.^(v) In Ohio it has been held that, though perhaps once uncertain, the English law is now that a promise to indemnify one for becoming a guarantor is within the Statute of Frauds; the court admitted that the law was otherwise in Maine, Georgia, and Kentucky, but made a strong answer to the sophism that,

(v) Macey v. Childress, 2 Tenn. Ch. (Coop.) 442.

as the guaranteed person was under no liability when the indemnity was given, the latter is not collateral.^(w) In Virginia it was held that oral proof of a promise that, if the plaintiff would become surety on a bond, the defendant, the obligee in the bond, would give the plaintiff a written indemnity to save him harmless, was inadmissible in a suit on the bond.^(x) So where the defendant, who held a draft to which he was not a party, asked the plaintiff to endorse it, and promised to save him harmless, and the plaintiff did so endorse, the Statute of Frauds is a good defence.^(y) Where the defendant, who held land, mills, and other property of M., procured the plaintiff to endorse a note of M.'s drawn to the plaintiff's order, by agreeing to guarantee it, this was held not to be original, but to be a guaranty within the Statute of

(w) *Easter v. White*, 12 Ohio St. 224, citing *Winckworth v. Mills*, *Green v. Cresswell*, and *Cresswell v. Wood*, and saying that *Thomas v. Cook*, *contra*, was questioned in *Green v. Cresswell*; and that *Kingsley v. Balcome* overrules *Chapin v. Merrill*; and citing *Carville v. Crane*, *Farley v. Cleveland*, *Barker v. Bucklin* as the same as *Kingsley v. Balcome*.

There is a decision of Lord Kenyon which has been said to rule that an indemnity to one for becoming a guarantor is within the Statute of Frauds, viz: *Winckworth v. Mills*, 2 Esp. 484; it does not do so, however, and is, moreover, very doubtful on principle; it held that a promise by a second endorser, made to a third endorser and the latter's endorsee, that, if they would sue the first endorser and maker of a promissory note, he, the second endorser, would pay the costs, was within the Statute; though the word "indemnity" was used, this case had nothing to do with an indemnity of a guaranty; and as the promisor had a direct pecuniary interest in having the endorsee get their money out of the

maker of the note or the first endorser, it is doubtful whether the promise is within the Statute of Frauds at all.

(x) *Towner v. Lucas*, 13 Gratt. 716.

(y) *Kelsey v. Hibbs*, 13 Ohio St. 352, citing *Easter v. White* and *Green v. Cresswell*; see *Ferrell v. Maxwell*, 28 Ohio St. 386 (dictum).

In Kentucky it has been held that where a vendor of land who had received a bill of exchange for the price, drawn by the vendee on U. T. in favor of him, the vendor, and had endorsed it and passed it away, and afterwards, by agreement of the vendee, conveyed the land to the latter's assignee, he cannot, under the Statute of Frauds, hold the latter on a promise to indemnify him, the vendor, from liability on the bill of exchange; it will be seen that on the bill the original vendee as the maker and U. T. as the drawee and *semble* acceptor were both liable to the vendor, who was drawee and first endorser, and, therefore, that the promise of indemnity given by the second vendee was collateral to the liability of the first vendee and of U. T.; *Floyd v. Harrison*, 4 Bibb, 77.

Frauds, because M. remained liable.(z) In a case in 20th Vermont the rule is noticed, but not passed upon.(a)

§ 145. It would be idle to deny that there is much authority for the opposite proposition, that an indemnity to one for becoming a guarantor is not within the Statute of Frauds. In a case already referred to Vice-Chancellor Malins said, that a promise to indemnify one for becoming a guarantor is not within the Statute of Frauds; to hold otherwise would be to make the statute a cover for fraud.(b) In a case in the chancery of Ireland, where, however, as in *Thomas v. Cook*, the indemnitor was himself liable for the debt as well as the promisee, the same view is taken.(c) The case of *Reader v. Kingham*, which is often cited as holding an indemnity for assuming a guaranty to be valid by parol is not a question of indemnity at all; the defendant promised the plaintiff, a bailiff, who had arrested one H. A., that he would pay the debt or produce the body of H. A. by a certain time.(d) A decision in 10 New Hampshire, which resembles *Reader v. Kingham*, really was a promise of indemnity, and to the latter the Statute of Frauds was held not to apply, because adopting the theory of *D'Wolf v. Rabaud* (see § 97); the court held, that the two engagements, that of the indemnitor and that of the person bailed, were separate, though each made to the plaintiff.(e) This continues to be the New

(z) *Simpson v. Nance*, 1 Spear, 7.
(a) *Beaman v. Russell*, 20 Vt. 216, noticing the authorities.

(b) *Wildes v. Dudlow*, L. R. 19 Eq. 200; 44 L. J. Ch. 341; 23 W. R. 435, 11 Moak, 791 (note); *Thomas v. Cook*, was relied on; *Green v. Cresswell*, *contra* to *Thomas v. Cook*, said to be reversed in *Reader v. Kingham*; *Mountstephen v. Lakeman*, below, shook *Reader v. Kingham*, but was itself reversed in the Exchequer and in the House of Lords. The note in Moak sustains Malins, V. C. As to *Thomas v. Cook*, see above.

(c) *Rae v. Rae*, 6 Ir. Ch. 494, citing *Hargreaves v. Parsons*, *Thomas v. Cook*,

Eastwood v. Kenyon, and doubting *Green v. Cresswell*.

(d) *Reader v. Kingham*, 13 C. B. N. S. 352; 7 L. T. N. S., 789; see *supra*, § 100, for a consideration of this case.

(e) *Holmes v. Knights*, 10 N. H. 176; see *Macey v. Childress*, 2 Tenn. Ch. 445; 3 South. Law Rev., 438, for an elaborate criticism upon *Holmes v. Knights*, saying that the absence of a request from the party bailed to the plaintiff to become bail is not a ground for making any exception to the Statute of Frauds, and that *Holmes v. Knights*, looks towards the view of *D'Wolf v. Rabaud*.

Hampshire rule; in a late case(*f*) the court thought that on principle the question was very doubtful, and decided it on local authority, as above. They said: "The question is not new. It is old and vexatious; the authorities are not uniform. The English are hopelessly in conflict, and the American courts are in the same condition." The direct authorities are nearly equally divided. Those deciding that the promise is within the Statute, insist that if the sureties become such solely upon the promise of the promissor, still the law raises an implied promise of indemnity by the principal from the existence of the relation of principal and surety, to which the express promise of the promissor is collateral, and, therefore, within the statute.(*g*) The reasoning of the courts, which hold that the promise is not within the Statute, is not always the same. The more common is, that the promise must be made to the creditor to be within the Statute; that a promise to the debtor to pay his debt to the creditor, or to a surety to indemnify him for becoming surety for a third person to a fourth, is an original and not a collateral undertaking, when the promisee acts solely on the promise of the promissor.(*h*) Until overruled, as we have already seen, the leading case in America on this side of the question was *Chapin v. Merrill*.(*i*) In an Alabama case, one E. signed a note as surety for B., upon a verbal promise being given by Pierson, who owed B. money, that if he, E., would so sign, he, Pierson, would indemnify him. Pierson's debt to B. was attached by Godden, a creditor of B.'s. It was held that Pierson's verbal promise was not within the Statute of Frauds.(*j*) An elaborate decision in a recent Indiana case, follows Vice-Chancellor Malins's view to

(*f*) *Demeritt v. Bickford*, 58 N. H. 523; citing *Holmes v. Knights*, *Proprietors v. Abbott*, *Tibbetts v. Flanders*, *Fiske v. McGregory*.

(*g*) *Id.*, citing *Easter v. White*, *Green v. Cresswell*.

(*h*) *Id.*, citing many cases.

(*i*) 4 Wend., 657, overruled in *Baker v. Dillman*, and in *Kingsley v. Balcome*. In a later New York case (*Mallory v. Gillett*, 21 N. Y. 433) the Statute of

Frauds was said not to apply, where there was no original debt to which the auxiliary promise could be collateral; for example, where the promisee was a mere guarantor for the third person to some one else, and the promissor agreed to indemnify him, or where his demand was founded in a pure tort.

(*j*) *Godden v. Pierson*, 42 Ala. 374, citing *Mason v. Hall*, 30 Ala. 599.

the letter. The court says: "It is impossible to conceive a guaranty as existing without some act or contract guaranteed. A contract of indemnity is essentially an original one. Between the promissor and promisee there is a direct privity. Between the person to whom the promise of indemnity is given, and the person for whom the latter undertakes as surety or bail, there is no privity at all. No matter what may be done by the person for whom bail is entered, at the request of a third, he who becomes bail cannot have any action, because as to the person bailed the undertaking was purely voluntary.^(k) The contract is an original and independent one, in which there is no remedy against the third party. A contract of this character has long been held not to be within the Statute. The general rule running through almost all the cases is, that, if the third person is not liable, then the undertaking is not within the Statute."^(l) As to this case, and the argument therein made, it will be enough, putting aside for the present the question of indemnity to one for becoming bail either civil or criminal, to say, that it is not true that there is no privity between the person whose obligation is guaranteed and the guarantor, or that there is no liability on the part of the former to the latter. It will be difficult or impossible to find a case in which there was not either a previous request or subsequent promise by the person guaranteed to his guarantor, or in which the two did not

(k) *Anderson v. Spence*, 72 Ind. 316, citing cases.

(l) *Id.*, citing *Read v. Nash*, 1 Wils. 305; *Tomlinson v. Gill*, Amb. 330; *Loomis v. Newhall*, 15 Pick. 159; *Harrison v. Sawtel*, 10 Johns. 242; *Toplis v. Grane*, 5 Bing. N. C. 636; *Marcy v. Crawford*, 16 Conn. 549. The court in *Anderson v. Spence* claims that the law is to the same effect in Massachusetts, Pennsylvania, Iowa, Maine, New Hampshire, Vermont, Maryland, Georgia, and Kentucky, and cites, among other authorities, *Vogel v. Melms*, 31 Wis. 306; *Shook v. Van-*

mater, 22 Wis. 535; *Reed v. Holcomb*, 31 Conn. 360; *Sanders v. Gillespie*, 59 N. Y. 250; *Green v. Brookins*, 23 Mich. 48; *Stocking v. Sage*, 1 Conn. 519; 3 Pars. Con., 6th ed., 21 n.; *Roberts on Frauds*, 223; 1 *Hilliard, Con.*, 284, sec. 11, 355, sec. 12; *Throop, Verbal Agreements*, sec. 361. The court also relied upon *Thomas v. Cook*, *Batson v. King*, *Cripps v. Hartnoll*, *Reader v. Kingham*, and *Wildes v. Dudlow*, as opposed to *Green v. Cresswell*, and *Winckworth v. Mills*, and denied *Brush v. Carpenter*.

become parties to the same obligation by a common act.^(m) This Indiana case itself was a promise to guarantee one for becoming bail for another in a criminal case; and it is agreed on all hands that a person bailed owes no duty to his bailor in the way of compensation.

§ 146. We come now to a number of cases which were outside of the Statute of Frauds for other reasons than the rule in *Chapin v. Merrill*. Thus, where the indemnitor received a new consideration moving directly to him, and had a leading purpose in view in giving the promise.⁽ⁿ⁾ So a promise to indemnify one for endorsing a promissory note is not within the Statute of Frauds, if the promisee relied solely upon the indemnity, and not all upon any promise to, or liability towards, him on the part of the maker of the note.^(o) In a Kentucky case the theory of the decision seems to be that though the principal was bound to reimburse the plaintiff, yet the defendant promised absolutely to indemnify the plaintiff, and not merely to indemnify him, if the principal did not, nor even to pay if the principal did not pay in the first instance.^(p) In an Indiana case a promise by the defendant already liable as surety on a promissory note, that if the plaintiff would also become liable on the note as surety, he, the defendant, would hold him, the plaintiff, harmless, was said, and correctly, to be valid by parol. This case, precisely like *Thomas v. Cook*, is a good decision

Cases supporting an oral indemnity distinguished.

(m) See *Macey v. Childress*, above, where this point is met.

(n) *Mills v. Brown*, 11 Ia. 317.

(o) *Vogel v. Melms*, 31 Wis. 310 (claiming that the weight of American authority supports *Chapin v. Merrill*); but see *Macey v. Childress*, *supra*, denying this, and relying on *Shook v. Vanmater*, and *Holmes v. Knights*.

The court said "that the fact that in the principal case the endorsement and indemnity were contemporaneous, while in *Shook v. Vanmater* the indemnity was for a liability previously incurred, is not material; *semble* that the jury found that the maker of the

note was insolvent when the note was given, and that the plaintiff knew this.

(p) *Dunn v. West*, 5 B. Mon. 382; 3 South. Law Rev., 444 (Chancellor Cooper), criticizes the distinction in *Dunn v. West* as very subtle. In *Dunn v. West* it was pretended that there was no obligation to the guarantor on the part of the person guaranteed when the indemnity was given, the promise being, not that the indemnitor would pay the guarantor if the person answered for did not, but that if the latter failed to pay the original debt, and the guarantor was obliged to pay, the indemnitor would pay him.

based on a doubtful reason.(q) So, in other cases, the defendant was already liable for the debt for which he undertook to give an indemnity; and in Chancellor Cooper's decision, already cited, this difference is clearly distinguished.(r) Or was principal or co-principal.(s) The following are examples of this: Thus, where the defendant, who had renewed a guaranty of a note twice, refused to do so when the note fell due for the fourth time, but promised to indemnify the plaintiff if he would do so; this was held to be the mere employment of the plaintiff to act as the agent or substitute for the defendant, and to be a valid contract upon which an assumpsit would lie.(t) And in a Kentucky decision, which relied on the principle of Chapin v. Merrill, the promisee became surety in an injunction-bond, under which the promissor's property was relieved from an execution; here the indemnity laid upon the promissor what was merely a liability to pay a debt resting upon his own property; an engagement to which, as has been seen, the Statute of Frauds does not apply; the court thought, as the promise was made to the surety and not to his creditor, that the rule of Eastwood v. Kenyon applied; but this is only so if we accept the principle of Chapin v. Merrill; under the doctrine as laid down in the beginning of the present discussion, the surety becomes ultimately the creditor for whom he becomes

(q) Horn v. Bray, 51 Ind. 560.

The court took the broad ground that an indemnity for a guaranty is not within the Statute of Frauds; admitting that Winckworth v. Mills (2 Esp. 484) was *contra*, and that Thomas v. Cook (8 B. & C. 728) was overruled by Green v. Cresswell. Bissig v. Britton (59 Mo. 204) was cited, and Brush v. Carpenter (6 Ind. 78) was denied; Nelson v. Boynton (3 Mete., Mass. 396) was distinguished as belonging to a different class of cases; Kingsley v. Balcome (4 Barb. 131) and Green v. Cresswell were denied. The rule of Green v. Cresswell was said to have been followed in Brown v. Adams, 1 Stew. (Ala.) 51; Draughan v. Bunting,

9 Ired. 10; Simpson v. Nance, 1 Spear Law, 4; Kingsley v. Balcome, 4 Barb. 131; Martin v. Black, 20 Ala. 309; Easter v. White, 12 Ohio St. 219.

For the doctrine that an indemnity for a guaranty is not within the Statute of Frauds, citing Chapin v. Merrill, and a great number of cases.

(r) Jones v. Letcher, 13 B. Mon. 364; Jones v. Shorter, 1 Kelly, 294; Garner v. Hudgins, 46 Mo. 399; Harrison v. Sawtel, 10 Johns. 242; Barry v. Ransom, 12 N. Y. 462; Smith v. Sayward, 5 Greenl. 504; Blake v. Cole, 22 Pick. 97.

(s) Reynolds v. Doyle, 1 M. & G. 753; Batson v. King, 4 H. & N. 176.

(t) Hassinger v. Solms, 5 S. & R. 9.

guarantor, and therefore the promise is not to the debtor, as in *Eastwood v. Kenyon*, but to the creditor. (u) A Missouri decision of some interest is like this last: one I. T. H. gave a note, and applied the proceeds, as by agreement with the defendants, to the use of the latter; the plaintiff, on the renewal of the note, made a payment thereon; it was held that for this payment I. T. H. became his debtor, and that as the plaintiff became surety upon a promise of indemnity from the defendants, and that, as they had the use of the proceeds of the note, the debt was theirs, and they could claim the benefit of the Statute of Frauds, although, for want of privity, they could not have been sued by the payee of the note. (v) So, in a decision in Massachusetts, the indemnity was given by one already bound to one about to become his co-surety. (w) So, where the defendant was paying, by means of the obligation guaranteed, another debt of his own. (x) In a Wisconsin case, where *Chapin v. Merrill* was relied on, there was the surrender of a lien, and there was no liability on the part of the person for whom the promisee became liable, so that on these grounds the oral promise was clearly good. (y) So, in a Massachusetts case, there was no liability in the party answered for; the indemnitor was put in funds, and the indemnity was for becoming bail (civil), so that there were these other reasons for holding the oral contract good. (z) So, where the plaintiff, at the defendants' request, became surety for A., who was the defendants' agent, to buy and take the title in certain land for them, the defendants. (a) So where, in consideration that the plaintiff would go to a certain place and become bail for the defendant's son, the defendant promised to pay a debt due from the son to the plaintiff, the Statute of Frauds applied to the latter promise, but the plaintiff might recover his travelling expenses. (b)

(u) *Lucas v. Chamberlain*, 8 B. Mon. 277.

(y) *Shook v. Vanmater*, 22 Wis. 535.

(v) *Garner v. Hudgins*, 46 Mo. 399; see, also, *Doane v. Newman*, 10 Mo. 69.

(z) *Perley v. Spring*, 12 Mass. 297.

(w) *Taylor v. Savage*, 12 Mass. 102.

(a) *Smith v. Sayward*, 5 Greenl. 506.

(x) *Peck v. Thompson*, 15 Vt. 639.

(b) *Rogers v. Rogers*, 6 Jones, 303.

§ 147. The English authorities are nearly all of them affected by a further question which must never be lost sight of in citing them; that question is whether one bailed in a criminal or in a civil case owes it to his bail to compensate him if obliged to pay; if there is such a duty the problem now under discussion arises and must be met, but if there is no such duty, the Statute of Frauds of course does not apply to an indemnity to one for becoming bail. If there were a case which held that one bailed should compensate his bail, and which further held that an oral indemnity to one for becoming bail was valid, we should have authority for the principle of *Chapin v. Merrill*, but no English case decides this, some cases decide that there is such a duty incumbent upon the person bailed and that the Statute applies; others contradicting these decide that there is no such duty, and that the Statute does not apply, neither therefore support *Chapin v. Merrill*; while, as has been seen, the dictum in *Thomas v. Cook* does so, the latter case for other reasons is not within the Statute of Frauds. The law as to criminal bail is settled to the effect that there is no liability in the person bailed to the bail, and therefore the indemnity to the latter is not collateral, and is valid by parol.^(c) It has been said that a contract of indemnity of bail by the person bailed in criminal cases was illegal as against public policy, giving the government only one security instead of two.^(d) The case of civil bail, though now probably settled to the same effect, was long in doubt; in an early case (*semble* of civil bail) the defendant's bail asked for relief on the ground that they had become bail upon a promise of indemnity on the part of the defendant's attorney, and made affidavit to this fact, but the court saying that recovery was sought on a parol promise declined to interfere in a sum-

(c) *Jarmain v. Algar*, Ry. & Mood. 349; 2 C. & P., 249; *Cripps v. Hartnoll*, 4 B. & S. 419; 32 L. J. Q. B., 381, distinguishing *Green v. Cresswell*; see note to Amer. ed. of 4 B. & S.; *Chapin v. Lapham*, 20 Pick. 471; *Brush v. Carpenter*, 6 Ind. 79; *Macey v. Chil-*

dress, 2 Tenn. Ch. 442; *Holmes v. Knights*, 10 N. H. 175; *Kingsley v. Balcome*, 4 Barb. 132, citing and considering many cases and overruling *Chapin v. Merrill*.

(d) *Jones v. Orchard*, 16 C. B. 623; 1 Jur. N. S., 936; 24 L. J. C. P., 229.

mary way, and left the parties to their action.(e) In *Green v. Cresswell*, since overruled, it was decided that there was a liability in the person bailed to save his bail harmless, and that, therefore, a promise to the latter was within the Statute of Frauds.(f) The distinction between civil and criminal bail never prevailed in America, and there in neither case is the person bailed liable to his bail.(g)

§ 148. In leaving this subject it should be noted that the word "indemnify" is often used in a different sense than that which is given to it in the present discussion, and if it merely denotes an agreement to pay a person for any expense or loss incurred by him, and does not cover an undertaking for the liability to the promisee due by some third person, there is no reason why the Statute of Frauds should apply. Thus a promise by the plaintiff in an execution to indemnify the sheriff for levying upon certain goods is valid, though oral, because no liability on the part of a third person to the sheriff is here answered for; whatever liability may arise, it will be from the sheriff to the third person.(h)

The meaning of the word "indemnify."

§ 149. The lines of distinction between those guarantees whose validity depends upon the mutual relations of the parties to the contract, and those in which the problem relates rather to the nature of the subject-matter of the promise, *i. e.*, the obligation answered for, have been found to be so subtle, that it has been thought better to follow the arrangement as given above. Under the head, therefore, of the subject-matter of the guaranty, a principle now arises for consideration which had some claim to

What is debt default, or miscarriage.

(e) *Beal v. Langstaff*, 2 Wils. 371.

(f) 10 A. & Ell. 457, denying *Thomas v. Cook*, and distinguishing *Adams v. Dansey* as a case where no third person was liable; see *Cresswell v. Wood*, 10 A. & Ell. 462.

(g) *Macey v. Childress*, 2 Tenn. Ch. 442, saying that *Green v. Cresswell* was questioned in *Fitzgerald v. Dressler*, *Cripps v. Hartnoll*, and *Batson v. King*; and in America citing *Holmes v. Knights*,

Kingsley v. Balcome, *supra*; see, also, *Anderson v. Spence*, 72 Ind. 316, citing many cases; see *Harrison v. Sawtel*, 10 John. 242; *Perley v. Spring*, 12 Mass. 297; *Aldrich v. Ames*, 9 Gray, 76.

(h) *Stark v. Raney*, 18 Cal. 624; see opinion of Pollock, C. B., in *Cripps v. Hartnoll*, 4 B. & S. 419; 32 L. J. Q. B. 381; see *Alger v. Scoville*, 1 Gray, 391.

be taken up in the beginning of that division of the law of guaranty, but which was postponed for the reasons just stated (see § 144). The question is, what is meant by the "debt default, or miscarriage," the engagement to answer for which must, by the Statute of Frauds, be in writing. Where, for example, one T. E. M. had ridden the plaintiff's horse and injured it, the defendant's promise to answer for this injury is within the Statute of Frauds.⁽ⁱ⁾ So, where the plaintiff having refused to hire a horse to B., the defendant said, "If you give him the horse I will be responsible if anything goes wrong;" B. ill-treated the horse whereby he died.^(j) Where the plaintiff sued for bonds filed with a provost-marshal, the defendant, as security that certain soldiers furnished by the plaintiff as a town quota should not desert before reaching the rendezvous, the oral agreement was held to be within the Statute of Frauds, and not executed by the delivery of the bonds, so as to justify the provost-marshal in retaining the bonds.^(k) A warranty not under seal for the quiet enjoyment of land must in New York express a consideration under the Statute of Frauds.^(l) A promise to execute, as surety, a writing that a third person will return certain bonds to be lent, is within the Statute of Frauds.^(m) So a promise by a father to pay for his son's default in consideration of forbearance to sue the son who had fraudulently violated a contract by converting to his own use goods he had undertaken to carry to a consignee, is within the Statute of Frauds; the tort arising out of a contract is within the Statute of Frauds.⁽ⁿ⁾ It may be asked whether a promise that the promisee shall be compensated as to, or protected against a third person's claim, is one relating to the "debt default, or miscarriage" of another or not.^(o) The guaranty of the warranty of a chattel is within the Statute of Frauds.^(p) Where negroes were sold cheap to

(i) *Kirkham v. Marter*, 2 B. & A. 613, distinguishing *Read v. Nash* as a case where it did not appear that the third person was liable.

(j) *Hamm v. McAfee*, 5 All. (N. B.) 386.

(k) *Richardson v. Crandall*, 48 N. Y. 353.

(l) *Kerr v. Shaw*, 13 Johns. 237.

(m) *Hayes v. Burkam*, 51 Ind. 136, citing cases.

(n) *Turner v. Hubbell*, 2 Day, 459.

(o) *Britton v. Angier*, 48 N. H. 422.

(p) *Glenn v. Rogers*, 3 Md. 322.

a third party on the defendant's verbal agreement that they should be kept in the neighborhood, and for the vendee's own use, but, in fact, the defendant knew that the vendee was a dealer, and the negroes were removed to another state, the defendant is liable in an action of fraud; his engagement is not a guaranty protected by the Statute of Frauds.(*q*)

§ 150. Before closing this subject a few miscellaneous points may be noticed. As to the effects of the full or part performance of a guaranty, see the chapters treating of these subjects.(*r*) A memorandum of guaranty must be clear and satisfactory.(*s*)

Miscellaneous points.

§ 151. In Kentucky the plaintiff's petition must state that the promise was made to the debtor;(t) the declaration on a guaranty within the Statute of Frauds should be special;(u) while on an original promise indebitatus assumpsit will lie.(v) It has been held that on a promise to meet a guaranty out of the goods of the person answered for held by the guarantor the action should be on the special contract.(w) It has been said that where a suit is brought upon a promise to pay the debt of another, the subsequent promise, and not the original debt, must be declared on.(x) Recovery cannot be had, it has been decided in Ireland, upon an account stated, where the cause of action is a guaranty, because that action presupposes an original liability and not a collateral one.(y) The questions of fact which give rise to the exceptions to the Statute of Frauds are for the jury;(z) and where it is doubtful whether a promise is sole, collateral, or joint, the case goes to the jury.(a)

Pleading and practice.

(*q*) *Adams v. Anderson*, 4 Harr. & John. 559.

(*v*) *Elder v. Warfield*, 7 Harr. & John. 391.

(*r*) See, also, *Watrous v. Chalker*, 7 Conn. 224; *Beal v. Brown*, 13 Allen, 114; see *Rhodes v. McKean*, 55 Ia. 548. As to Scotch cases, see § 26.

(*w*) *Hetfield v. Dow*, 3 Dutch. 446.
(*x*) *Wagnon v. Clay*, 1 A. K. Marsh. 257; see *Hayden v. Steadman*, 3 Or. 550.

(*s*) *Keck v. McKinley*, 98 Pa. St. 617.

(*y*) *Marshall v. Wilson*, 18 Ir. Jur. (N. S., vol. xi.) 170; see *Wilson v. Marshall*, 2 Ir. Rep. C. L. 356.

(*t*) *Davis v. Wiley*, 3 Kent. L. Rep. 755.

(*z*) *Robinson v. Gilman*, 43 N. H. 490.

(*u*) *Runde v. Runde*, 59 Ill. 98; *Wagnon v. Clay*, 1 A. K. Marsh. 257.

(*a*) *Heywood v. Stiles*, 124 Mass. 275.

CHAPTER VI.

PROMISES BY ADMINISTRATORS OR EXECUTORS TO
ANSWER OUT OF THEIR OWN ESTATES.

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| <p>§ 152. The promise generally and the application of the Statute of Frauds.</p> <p>§ 153. Difference between special promise of an administrator and a guaranty.</p> <p>§ 154. The effect of the non-liability of the decedent's estate.</p> <p>§ 155. Promise to pay a legacy.</p> <p>§ 156. Oral promise in consideration of assets—how far valid.</p> <p>§ 157. Assets good consideration for the promise.</p> <p>§ 158. Forbearance good consideration for the promise.</p> <p>§ 159. Nature of the consideration—Forbearance.</p> <p>§ 160. Further discussion of difference between a guaranty and the special promise of administrator.</p> | <p>§ 161. Further discussion of the effect of the non-liability of the decedent's estate.</p> <p>§ 162. Pleading.</p> <p>§ 163. Evidence.</p> <p>§ 164. Written admission of assets and other evidence of a promise.</p> <p>§ 165. Submission to arbitration.</p> <p>§ 166. Accounting by administrator.</p> <p>§ 167. Promissory notes, etc., given by administrator.</p> <p>§ 168. Powers and liabilities generally of administrators, etc., and the form of action against them.</p> <p>§ 169. Administrator not liable in certain cases on his writing.</p> <p>§ 170. Part performance.</p> <p>§ 171. Miscellaneous.</p> |
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§ 152. BY the first clause of the fourth section of the Statute of Frauds it is enacted "That no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, . . . unless the agreement . . . or some memorandum or note thereof shall be in writing," etc. Besides the authorities cited generally in this chapter, the following are a few cases recognizing the statutory provision.(a) This is also the

(a) *Smithwick v. Shepherd*, 4 Jones, S. & M. 161; *Berry v. Graddy*, 1 Mete. Law (N. C.), 197; *Hay v. Green*, 12 (Ky.) 556; *Grindall v. Davies*, Freem. Cush. (Mass.) 283; *Ciples v. Alexander*, 2 Constit. Rep. 768; *Burt v. Heron*, 66 Pa. St. 404; *Okeson's Appeal*, 59 Pa. St. 101; *Robinson v. Lane*, 14 Ch. (English) 532; *Ordinary v. Bonner*, 2 Hill (S. C.), 469; *Philpot v. Briant*, 4 Bingh. 721.

law in Louisiana.(b) Without such evidence the administrator is liable only for the assets.(c) The statute does not apply to a promise made before becoming administrator, though made to the intestate's widow, that if she would permit the promissor to become administrator he would make up any deficiency of assets.(d) See *infra*. Nor to a promise made by the heir.(e) *Herbert v. Powis*, 1 Bro. P. C. 355, a decision difficult to understand from the manner in which it is reported, seems to have been a case where the administrator, who also claimed to be heir, obtained his letters by taking an assignment of a certain legacy, but subject to the conditions exacted by the legatee that he should pay a certain annuity bequeathed to the complainant by the testator whose administrator the defendant became; and where the administrator by omitting to give proper notice to the complainant, succeeded in obtaining the letters of administration to which she, the complainant, had a prior right: under these circumstances, a parol promise to pay the annuity made by the administrator shortly after becoming such, was held binding on him personally; the transaction seems to have been regarded as creating a *quasi* trust. A dictum in a not dissimilar case suggested a liability both as administrator or *de bonis propriis* at the option of the creditor on the part of one who had collected a claim due in the first instance to the decedent as agent, but due ultimately to the plaintiff as principal.(f) Nor does the statute apply to an agreement between heirs disputing a will and an administrator c. t. a. that the case should be discontinued and that the administrator should pay costs, because *semble*, that in the first instance at least, there is no liability upon the estate to pay costs under such a settlement, and this, though perhaps the administrator might afterwards have credit for such payment in his account.(g)

(b) *Mumford v. Bowman*, 26 La. Ann. 415.

(c) *Templeton v. Bascom*, 33 Vt. 135.

(e) *Robinson v. Lane*, 14 Sm. & M. 161.

(f) *De Valengin v. Duffy*, 14 Peters, 291.

(d) *Tomlinson v. Gill, Ambler*, 330. 550.

(g) *Chambers v. Robbins*, 28 Conn.

See *Throop, Verb. Agreeem.* § 20.

§ 153. At this point, therefore, arises the question from which it is impossible to long escape in considering the special promise of an administrator, and that is how far such a promise partakes of the nature of a guaranty; it will be seen hereafter, that the two engagements differ in some significant respects, and the language of the statute speaks generally of "any special promise" of administrators, and does not expressly refer to the assumption by them of debts of their decedents. The word "special," however, must have some force given to it, and it will not be contended that the statute applies to every promise aliunde made by one who happens to be an administrator or executor. The engagement must have some direct connection with the estate represented. The extent of that connection is the problem. Admitting that a promise to pay the debt of the decedent is within the statute, does the same rule apply to an agreement by the administrator whereby, though there has been no debt of the decedent to be assumed, an advantage has yet been obtained for the estate. The above case would appear to answer no to this question. But a consideration of the comprehensive wording of the statute and of the omission of any reference to the debts of the decedent would rather support an application of the law to every promise of the representative, the consideration of which enures to the estate represented.

§ 154. If, as will be contended hereafter, the administrator's promise is still within the Statute of Frauds, though the claim of the promisee against the estate is released, and the new promise of the administrator is substituted therefor, it would seem to follow that the existence or absence of indebtedness on the part of the estate, is not the test to try whether the statute applies; differing in this respect totally from a guaranty. There is, however, a class of cases in which it is held that where an administrator has incurred indebtedness in his management of the estate, the latter will not be liable to suit by a stranger, but that the administrator shall pay from his own goods, and

Difference between special promise of an administrator and a guaranty.

The effect of the non-liability of decedent's estate.

get an allowance from the assets when he accounts.^(h) It may well be, that for costs and the ordinary charges of his trust an administrator is personally liable and should protect himself by reserving assets, or by special application to the court. Because, while the estate is ultimately chargeable, it may be for the convenience of suitors and may tend to prevent interference with the orderly distribution of the estate, that the administrator should pay, and that no action should lie against the estate. An administrator then can only be liable on one of two grounds, either his engagement express, or implied, was necessary and proper to the management of the estate and is in the end to be paid therefrom, his liability being only primary, and this will be the ordinary case, for the courts will stretch a point to protect an administrator in an expenditure honestly made on behalf of the estate. Or, on the other hand, the court which audits his account will refuse him an allowance to protect his liability under his promise. But this will rarely be done, except in cases of fraud or gross misjudgment on his part, and such fraud may constitute an exception to the Statute. The event is conceivable of an administrator sued in a common law court on his express oral promise, made in good faith and for a consideration enuring solely to the estate, being unable to have an allowance therefor made him out of the assets, because, perhaps, of the limited jurisdiction of the probate court which passes upon his accounts; in such a contingency the reason above given for taking his promise out of the Statute, viz., that his liability was only primary, and that the estate would repay him, would cease to apply. If, however, the test is the one sometimes laid down, that, namely, of the estate not being liable, this promise would be as little protected by the Statute as that creating only a primary liability on his part. This would suggest that the test in question is not a very safe one.⁽ⁱ⁾ Where the debt of the estate

(h) *Chambers v. Robbins*, *supra*; *Woods v. Ridley*, 27 Miss. 148, where it was held that the executor had no power to create a new cause of action, so as to subject the estate to a suit, but being personally liable thereunder, could, if the obligation was a proper one enuring to the benefit of the estate, have an allowance for it in his account, citing cases.

(i) *Throop, Verb. Agreem.*, § 40, citing *Meert v. Moessard*, and supporting

has become barred by the Statute of Limitations, the promise of the administrator to pay it is not the less within the Statute of Frauds.(j) So that on the whole the most comprehensive rule would be *that all assumptions made by the administrator on behalf of the estate which he represents are within the Statute of Frauds, and must, in order to bind him de bonis propriis, be in writing, and that to this rule there are only two exceptions, where, namely, the entire cause of action has arisen since the death of the decedent, and where either, first, the administrator is only primarily liable in his own estate, and can get reimbursement from the assets in his hands; or, where he is denied such reimbursement because of his fraud or mismanagement tantamount thereto.* Vide *supra ac infra*, and see, *Moar v. Wright*, 1 Vermont, 57.(k) The following case illustrates this point: Thus, where an administrator as to a matter arising after the testator's death, made a promise to stand by an arbitration of the dispute, the court said: "When the contract was made the estate represented by appellant was not liable for costs, and there was then no debt existing. Whether there was any subsequent default depended entirely upon the appellant himself. It was in his own power, at the time he made the contract, to create or prevent a default. The only default for which his contract made him liable was his own. He did not undertake to answer for the default of anybody else. If he had kept his promise, and abided the decision of the arbitrators agreed upon, there could have been no default for which he would have been answerable. The default which creates a liability against him in this action is his own. He agreed to abide by the decision of the arbitrators or pay the costs. He broke his contract, and it is this breach which constitutes the default for which this action seeks to make him answerable." And added: "It must be kept in mind that the subject-matter of the contract declared upon grows out of transactions which occurred after the decedent's death. The administrator's promise was not to pay some liability his decedent had incurred, nor to fulfil

Chambers v. Robbins, on the theory that the Statute applies only when the debt assumed is one which would regularly have come out of the estate.

(j) Ames v. Jackson, 115 Mass. 512.

(k) Mills v. Kuykendall, 2 Blackf. 50.

some engagement he had undertaken in his lifetime.(l) Mr. Throop shows a further difference between a guaranty and the promise of an administrator; in that a guaranty by one in his individual character of his liability acting *en auter droit*, is not within the Statute of Frauds, such an engagement in the case of an administrator is manifestly the very promise contemplated by the act.(m) An administrator, making a special promise within the Statute, can fulfil it and charge the personal representatives, though the original debt had become barred by the creditor having, in reliance upon the administrator's promise, forbore till the period of the statute of limitations had expired;(n) this involves, however, the disputed point of the power of an administrator to waive the statute of limitations. If the agreement entered into by the administrator is one which has the effect of charging not himself, but the estate he represents, the Statute does not apply. As where there was an express agreement between the plaintiff, an administrator, and the defendant, a creditor of the intestate, that if the defendant would buy certain land of the intestate, sold by the administrator for payment of debts, the defendant should have a credit on the bonds given for the price of the lands, which credit should amount to defendant's *pro rata* share of his debt due by the intestate, which he might with the other creditors recover; such a promise could be set up by the defendant in an action for the price of the land.(o) The last three cases(p) implying, as they do, ultimate liability on the part of the estate, should really turn on the power of the administrator to bind not himself, but such estate. A promise by an administrator to pay out of assets, as, for example, an oral agreement to waive the statute of limitations, is good by parol.(q) An executor can retain a debt due him by his tes-

(l) *Holderbaugh v. Turpin*, 75 Ind. 85. Me. 251, and *Hay v. Green*, 12 Cush-
(m) *Throop*, Val. Verb. Agreem., ing, 282.

§ 12 *et seq.*

(p) *Chambers v. Robbins*, Ames v.

(n) *Ames v. Jackson*, 115 Mass. 512. Jackson, *Norton v. Edwards*,

(o) *Norton v. Edwards*, 66 No. Car. (q) *Greening v. Brown*, Minor (Ala.),
368; see, also, *Piper v. Goodwin*, 23 353.

tator, though barred by the statute of limitations.(*r*) Where the defendant ordered goods on his own credit, for the children of J. M., whose executor he was, the court holding the engagement an original promise and not a guaranty, added: The promise is one which, by its terms, imposes a personal liability upon the defendant; and, notwithstanding he may have been an executor, authorized by the will to supply goods to the children of the deceased, and intended, at the time he made the promise, to pay out of the estate of the deceased, and the plaintiff himself expected payment to be made from that source, the defendant is personally liable on his promise. The purchases of the trustees, including executors, administrators, and guardians, when made in obedience to the duties of the trust, impose upon them a personal liability. The seller must look to them for payment, and they must look to the trust estate for reimbursement.(*s*) An administrator buying corn, for example, is individually liable, whether he buys for himself or the estate; in neither case does the Statute of Frauds apply.(*t*)

§ 155. A parol promise to pay a legacy was thought in one case not to come within the language of the Statute, not being damages.(*u*) The provision of the Statute would, however, appear to be wide enough to cover such a liability.(*v*) An executor may, by a promise properly evidenced, make himself personally liable to pay a legacy, the

Promise to
pay a
legacy.

(*r*) *Crooks v. Crooks*, 4 Grant, U. C. 616.

(*s*) *Sanford v. Howard*, 29 Ala. 691, citing *Simms v. Norris & Co.*, 5 Ala. 42; *Jones v. Dawson*, 19 Ala. 672; *Kirkman et al. v. Benham*, 28 Ala. 501; *Johnson v. Gaines*, 8 Ala. 791; *Peters v. Heydenfeldt*, 3 Ala. 205.

(*t*) *Harrell v. Witherspoon*, 3 McCord, 486. Another case which has given rise to some doubt may be explained on the same principle as this last. Where an executor ordered goods for the wife and children of his testator, and promised to pay for them out of the assets of the testator, and such

assets are shown, he is bound; this is holding the executor only primarily, for he is protected by the assets, and *semble* if he could show a failure of assets not caused by himself, as by the payment of debts of a higher degree, his promise would fall through failure of consideration; *Collins v. Rowe*, 10 Leigh, 114; see *Throop*, Val. Verb. Agr., § 47, for another view of this case.

(*u*) *Pettigrew v. Pettigrew*, 1 Stew. (Ala.) 580.

(*v*) *Hay v. Green*, 12 Cushing, 283; *Molyneux v. Scott*, 5 Ir. Ch. 295; *Throop*, Val. Verb. Agr., § 44.

consideration must be shown as assets or forbearance or the like.(w) It has been urged that it is only on an express promise by the executor that an action for a legacy will ever lie.(x) *Sed quære.*(y)

§ 156. The fact that the promissor holds assets of the estate will not take the promise out of the Statute.(a) In this important respect an administrator's promise differs from a guaranty.(b) But if we consider that a fund which will take a guaranty out of the Statute of Frauds has presumptively, at least, been put into the promissor's hands wherewith to pay the debt guaranteed, and that out of that fund the debt is supposed to be paid, we will see that the assets of an estate are never such a fund, since the question of an administrator's liability never arises till the attempt is made to hold specifically his private estate. However much the authorities on the "Funds" ex-

Oral promise in consideration of assets, how far valid.

(w) *Moar v. Wright*, 1 Vt. 63, citing *Atkins v. Hill*, Cowp. 284, and *Hawkes v. Saunders*, Cowp. 289, and saying that while *Deeks v. Strutt*, 5 T.R. 690, overrules these cases, it is only on the ground that, in England, chancery has exclusive jurisdiction of such actions; *Toller on Exec.* 464; *Walf. Act.*, 1408; *Molyneux v. Scott*, *supra* (considering very elaborately *Rann v. Hughes*, *Hawkes v. Saunders*, and *Reech v. Kennegal*); *McNeil v. Quince*, 2 Hayw. 153; *Sleighter v. Harrington*, 2 Tayl. 249; *Colwell v. Alger*, 5 Gray, 68; *Clark v. Herring*, 5 Binn. 37 (before the Pa. Statute of Frauds).

(x) *Toller's Executors* (Ingraham's notes), p. 464, n.

(y) *Colwell v. Alger*, 5 Gray, 68; *Wilson v. Wilson*, 3 Binn. 558.

That a suit for a legacy will lie at common law in America, see *Adams's Equity*, 250 (American note); *Commonwealth v. Hammond*, 10 B. Mon. 62; *Wilson v. Wilson*, 3 Binn. 558; *App. v. Dreisbach*, 2 Rawle, 289; *Negley v. Gard*, 20 Ohio, 910; *Foult v. Brown*, 2 Watts, 209; *Gould v. Hayes*, 19 Ala.

438; *Farwell v. Jacobs*, 4 Mass. 634, adducing a provincial statute of Will. & Mar.; *Gardner v. Gant*, 19 Ala. 666; *Chitty on Con.* (4th Am. ed.), p. 372, *et nn.*; *Wilson v. Long*, 12 S. & R. 60; *Mussleman's Appeal*, 65 Pa. St. 485; *Beecker v. Beecker*, 7 John. 99 (considering *Deeks v. Strutt*); *Gridley v. Gridley*, 24 N. Y. 130; see *Throop*, *Val. Verb. Agr.*, § 42-6; *Reech v. Kennegal*, 1 Ves. Sr. 126.

(a) *Lowndes v. Pinckney*, 2 Strobb. Eq. 44; *Colwell v. Alger*, 5 Gray, 67; *Sample v. Lipscomb*, 18 Ga. 687; *Burt v. Herron*, 66 Pa. St. 404; *Okeson's Appeal*, 59 Pa. St. 101; *Atkins v. Hill*, Cowp. 284; *Forth v. Stanton*, 1 Saund. 210-1; *Harrington v. Rich*, 6 Vt. 666; *Guishaber v. Hairman*, 2 Bush, 321; *Byrd v. Holloway*, 6 S. & M. 203; *Bank v. Topping*, 9 Wend. 273; *Hawkes v. Saunders*, Cowp. 289; *Chandler v. Davidson*, 6 Blackf. 368; *Silsbee v. Ingalls*, 10 Pick. 526 (dictum).

(b) See *Throop on Validity of Verb. Agreem.*, § 13 *et seq.*, and *Smithwick v. Shepherd*, 4 Jones, Law, 197 (regarding such promise as not a guaranty).

ception to that clause of the fourth section of the Statute of Frauds which relates to guaranties may differ, they all assume that it is the fund in his hands which enables the guarantor to pay the debt answered for. It is only as to how far the law shall inquire into the extent of the fund and the purpose for which it was given that the conflict of decision arises. The assets of his decedent can never enable an administrator to pay a debt out of his private estate, and he cannot lawfully apply the estate to pay his personal obligation. This point of difference between an administrator's promise and a guaranty is, therefore, rather apparent than real.(c) A fund held by the defendant as executor either under the will or *de son tort*, is not such as will take a guaranty out of the Statute of Frauds.(d) In a case holding that the mere possession by a guarantor of property of the person answered for will not take the promise out of the Statute of Frauds, it was said that the case of a promise by an administrator holding assets was not analogous.(e) That the promissor is executor *de son tort*, and has assets, does not create any liability on the parol promise,(f) on account of either of these facts. A parol agreement by an executor to allow, as set-off to a debt due the testator a judgment obtained against the executor in favor of the debtor for a matter arising since the testator's death, is within the Statute of Frauds, the executor having no assets.(g) As to written proof of assets, see *infra*. It is as administrator that a promissor having assets is bound,(h) though the form of action may be against him personally (*vide infra*). There have, however, been decisions that the possession of assets will take the administrator's promise out of the Statute of Frauds.(i)

(c) Browne's Stat. of Frauds, § 153, classes an administrator's promise with a guaranty; see *Harrington v. Rich*, 6 Vt. 673.

(d) *Chandler v. Davidson*, 6 Blackf. 368.

(e) *Crane v. Bullock*, R. M. Charlton, 319 (considering *Rann v. Hughes*, *Reech v. Kennegal*, 1 Ves. Sr. 123; S. C., S. N., *Kennigate*, Ambl. 67, and other cases.

(f) *Chandler v. Davidson*, 6 Blackf. 368.

(g) *Crews v. Williams*, 2 Bibb, 262 (adding that to allow the set-off of debt due by testator in his lifetime against a claim arising since would disturb the course of distribution).

(h) *Guishaber v. Hairman*, 2 Bush, 321.

(i) *Pratt v. Humphreys*, 22 Conn. 317 (relying on *Stebbins v. Smith*);

The reason being given in one case that though the damages in the first instance came out of the administrator's estate, the intestate estate was ultimately liable.(j) But the administrator in such case agrees to take the risk of the sufficiency of the assets, and to such agreement the Statute of Frauds should apply. Where the promise, as has already been seen, is to pay out of the assets, and assets are proved on the trial, the theory of the liability of the administrator being only primary, and of the real liability being in the estate, is probably well founded, certainly if he still has assets when judgment is obtained against him; whether, if having had assets, he voluntarily exhausts them, as by paying debts of the same degree, and failing to pay that for which he has given the oral promise, he is liable on such promise, notwithstanding the Statute of Frauds, is a different and more difficult question(k) (vide *supra*). Where the assets of the estate have been left in an administrator's hands, with a direction from all of the next of kin to apply them to funeral expenses of the decedent incurred by the plaintiff, the administrator is liable to the plaintiff, notwithstanding the Statute of Frauds.(l) Here the assets were diverted from their general purpose, and by the direction of those entitled to them converted into a fund devoted to a particular debt; and the objection, therefore, against regard-

see dictum in *Sidle v. Anderson*, 45 Pa. St. 464; *Collins v. Rowe*, 10 Leigh, 114 (the promise was to pay out of testator's estate; see *Throop*, § 48, treating this case as probably that of an attempt to defend on the guaranty clause of the Statute of Frauds and not the administrator clause, and showing that the promise as a guaranty was not within the Statute of Frauds); see, however, above.

(j) *Pratt v. Humphreys*, *supra*.

(k) *Collins v. Rowe*, *Sanford v. Howard*, *supra*; see *Reech v. Kennigal*, 1 Ves. Sr. p. 126. This point was raised in *Sleighter v. Harrington*, 2 Taylor, 249; where an executor, in consideration of assets, promised in writing to pay a

debt of the testator; the majority of the court—citing *Banes's Case* (9 Co. Rep., 91) and *Cleverley v. Brett*, cited in 5 T. R. 8—thought that the executor was liable *de bonis propriis* if at the time of his promise there were assets to give the latter a good consideration. Judge Seawell thought, however, that failure of assets even at the time of the trial, as by payment of other debts, of higher degree, or of equal degree without notice, would make the promise *nudum pactum*. Judge Seawell thought the promise made a difference only of form, and that the administrator was personally liable only because he was already liable as administrator.

(l) *Meert v. Moessard* 1 M. & P. 11.

ing assets in his hands as a fund to pay the administrator's personal promise does not prevail in this case. In a Canada decision, where, however, there was written evidence of the executor's promise (a promissory note), it was said, upon proof that the transaction was entirely after the testator's death: "As goods cannot be sold or services rendered to a person in a representative character, the law, from the delivery of the goods or the rendering the services at the request of the defendants, implies a personal contract on their part to pay"^(m) (*vide supra*). In an early case in Vermont, passing upon a promise given a few months before the passage of their Statute of Frauds, it was held that an executor was personally liable on a promise to pay a debt of the testator, which had been duly approved by the commissioner of the insolvent testator, and had been assigned to the plaintiff by the creditor, with notice to the defendant, who had assets in his hands.⁽ⁿ⁾ The question considered in this decision was one of the sufficiency of the consideration as determining the validity of the promise; and the court thought that there was a further consideration than merely that of the original debt; the court seemed to have thought that where the executor was liable because of assets, to further insist upon a personal liability arising out of his express promise was a mere difference of form; that an administrator so paying a debt had yet his remedy over against the estate, even though the creditor had discharged the estate; and that if the estate was not discharged, and the executor died or was removed, the removal of the assets from his hands made his promise invalid for failure of consideration, so that no injustice would be done by treating the administrator as personally liable (*vide supra*).

§ 157. Assets are a good consideration for an administrator's promise,^(o) a contract to pay which by

Assets

good con-

(m) *Kerr v. Parsons*, 11 U. C. C. P. 514.

(n) *Moar v. Wright*, 1 Vt. 63 (denying *Deeks v. Strutt*, and distinguishing *Forth v. Stanton* as a case where it did not appear that the defendants had assets applicable to the debt.)

(o) *Barnard v. Pumfrett*, 5 M. & C.

70; see *Horsley v. Chaloner*, 2 Ves. Sr. 83; *Turner v. Brown*, 3 S. & M. 438; *Bank of Troy v. Topping*, 9 Wend. 273, 13 Wend. 557; *Chambers v. Leversage*, Cro. Eliz. 644; *Trewinian v. Howell*, Cro. Eliz. 91; *Fisher v. Richardson*, Yelv. 55, Cro. Jac. 47; *Sidle v. Anderson*, 45 Pa. St. 464; *Williams*

its terms shows that the liability is confined to the assets, is not within the Statute of Frauds.^(p)

consideration
for the
promise.

§ 158. So likewise is forbearance by the promisee to press his claim against the decedent's estate. But this is so, perhaps, only to the extent of assets.^(q) In a written promise by an administrator to pay a mortgage on the intestate's property, principal and interest, upon a month's notice, the consideration is sufficiently shown in the writing, *i. e.*, a month's forbearance; he is liable *d. b. p.*, and it is immaterial whether the promise was made before or after he became administrator.^(r) A written promise by an administrator, like all other promises under the Statute of Frauds, must be supported by proof of a consideration; the writing raises no presumption of consideration.^(s) (*Vide infra.*)

Forbear-
ance good
considera-
tion for the
promise.

§ 159. The fact of forbearance of his original claim by the promisee will not take the administrator's promise out of the Statute of Frauds, and this though by such forbearance such original claim has been barred by the statute of limitations.^(t) Apart from the Statute of Frauds, the forbearance must be by express stipulation, and not a mere neglect to sue, relying

Nature of
the conside-
ration. For-
bearance.

v. Chaffin, 2 Dev. 333; *Guishaber v. Hairman*, 2 Bush, 321; *Agnew on Statute of Frauds*, p. 66 *et seq.*

(*p*) *Martin v. Black*, 20 Ala. 313.

(*q*) *Ordinary v. Bonner*, 2 Hill, S. C. 469; *Mosely v. Taylor*, 4 Dana (Ky.), 542; *Turner v. Brown*, 3 S. & M. 438; *Bank of Troy v. Topping*, 9 Wend. 273; 13 Wend., 557; *Van Orden v. Van Orden*, 10 Johnson, 30; *Johnsen v. Whitecott*, 1 Roll. Abr. 24, pl. 33; *Hamilton v. Terry*, 21 L. J., N. S., C. P. 134; *Gardener v. Fenner*, 1 Rolle Abr. 15, pl. 3; *Fisher v. Richardson*, Cro. Jac. 47 (S. C., sub nom., *Fish v. Richardson*, Yelv. 55); *Hawes v. Smith*, 2 Lev. 122; *Stebbins v. Smith*, 4 Pick. 97; *Pratt v. Humphreys*, 22 Conn. 317; *Walford on Actions*, p. 1468; *Agnew on*

Stat. of Frauds, p. 66 *et seq.*; *Williams on Exec.* (6th Am. ed.), p. 1777.

(*r*) *Wilson v. Luth*, 6 Vict. L. R. Law, 79, citing *Tomlinson v. Gill*, and especially *Childs v. Monins*, 2 B. & B. 460; *Goring v. Goring*, Yelv. 11.

(*s*) *Hester v. Wesson*, 6 Ala. 415; *Rann v. Hughes*, 7 T. R. 350, n. (a), denying dicta to the contrary in *Pillans v. Van Mierop*, 3 Burr. 1663; *Robinson v. Lane*, 14 Sm. & M. 161; *Byrd v. Holloway*, 6 Sm. & M. 203; *Walford on Actions*, p. 1467; *Toller on Executors* (Ingraham's ed.), p. 464, note; *Williams on Executors* (6th Am. ed.), p. 1776; *Agnew on Stat. of Frauds*, p. 66 *et seq.*; 1 Wms. Saund., p. 226.

(*t*) *Silsbee v. Ingalls*, 10 Pick. 526; *Harrington v. Rich*, 6 Vt. 666.

upon the promise; and where the consideration was assets, and there were no assets, a forbearance not stipulated for will not make the executor liable.^(u) And the forbearance must be for a definite time.^(v) On the contrary, it has been held that where an attorney acted for an executrix, and, in order that suits which she was bringing might be carried on, gave up to her some deeds on which he had a lien for his bill, the executrix was liable to pay the attorney's whole bill both for services for the intestate as for those for herself; and this though there were no assets (the whole transaction was by parol).^(w) So also a promise by an executor to pay rent due by the testator in consideration of the release of a distress.^(x) Here it will be noticed that the debt due by the testator was discharged as by the release of the distress; whether such discharge is a ground for taking the promise of the executor out of the Statute will be considered in a moment. In a case already cited,^(y) the creditor gave up securities which he held upon the testator's estate, but the promise was withdrawn from the Statute on another ground. In another case a legatee obtained a decree in chancery against an executor, directing that of lands devised by the testator for the payment of debts and legacies, such as were sold should be accounted for and the legacy paid, and that if the latter were not paid then that other portions of the land be sold to pay the legacy; the executor having promised by parol to pay the legacy failed to do so, died, and devised the land as part of his own property; under these circumstances recovery of the legacy was allowed against the executor's executor, the case being taken out of the Statute of Frauds by the legatee's forbearance to proceed under the original decree, relying upon the executor's promise.^(z) The proceeding seems rather to be one following specific land bound by a judgment than a recovery on a parol promise. Under a statute of Massachusetts

^(u) *Williams v. Chaffin*, 2 Dev. 333. *don*, 4 Bro. P. C. 4; 5 Vin. Abr. 279,

^(v) *Turner v. Brown*, 3 Sm. & M. pl. 53.

438.

^(w) *Hamilton (Duchess of) v. Ingle-*

^(x) *Kershaw v. Whitaker*, 1 Brev. 9.

^(y) *Stebbins v. Smith*, *supra*.

^(z) *Patton v. Williams*, 3 Munf. 59.

requiring written evidence to personally charge an assignee in insolvency, oral evidence was admitted of a promise by an assignee to procure the plaintiff's discharge from certain debts, make over to him certain accounts, and to pay him a sum of money, the amount of an allowance made him out of his estate by the commissioners in insolvency; and the reason for taking the case out of the Statute was the performance by the plaintiff of the consideration of the promise which was to procure the settlement of an action brought by a third party against the promissor; (a) no reasons were given for the decision.

§ 160. To a statute analogous to the Statute of Frauds, the consideration of forbearance was therefore regarded as creating an exception. It seems plain that, of the two conflicting lines of decision just indicated, the latter assumes that a promise by an administrator possesses two characteristics of a guaranty which have been denied to it not without reason, (b) viz: that both promises, if on the consideration of a lien surrendered by promisee to promissor, or if thereunder the original debt is discharged, are taken out of the Statute of Frauds; these exceptions, in the case of a guaranty, can be defended (*vide supra*); but while a promise to pay a debt which was or has become the promissor's own, or which has been extinguished, cannot be regarded as a promise to answer for the debt, default, etc., of another, it is difficult to see how the surrender of a lien on his (decedent's) property, or the extinguishment of the decedent's debt as against the latter's estate, makes the administrator's promise to answer for such liability any the less "a special promise to answer damages out of his own estate."

Further discussion of difference between a guaranty and the special promise of administrator.

§ 161. It is to be considered that there is difference of opinion among the writers on this point, one maintaining that administrators' promises and guaranties are alike in this respect, (c) and that another, though insisting strongly on this point (d) of difference, lays

Further discussion of the effect of the non-liability of

(a) *Holbrook v. Dow*, 12 Gray, 357.

(c) *Browne*, Statute of Frauds, § 193,

(b) *Throop on Validity of Verbal* 153.

Agreements, § 13 *et seq.*; *Smithwick v. Shepherd*, 4 Jones, Law, 197.

(d) *Throop*, Val. Verb. Agreem., § 13 *et seq.*

the decedent's estate. down a rule which, as has been seen, would appear to lead to the conclusion that where there is no debt of the estate, the Statute does not apply to the administrator's promise.^(e) The cases cited for the rule that the discharge of the estate took the administrator's promise out of the Statute are distinguishable; see below.^(f) Two of the authorities suggesting that the discharge of the decedent's estate will take the administrator's promise out of the Statute, or that the receipt of new consideration by the administrator will have this effect,^(g) are mere dicta. Another of the cases has already been distinguished.^(h) The others, however, seem positively to place an administrator's promise and a guaranty in the same category in regard to the two points which have just been considered.⁽ⁱ⁾ The greatest length, perhaps, to which this tendency has been carried was in a decision^(j) where an administrator was held liable on an oral promise to pay a note of his intestate's, whereby the plaintiff had been induced to take the note; the administrator also represented the note as good.

Generally as to what forbearance will as a consideration enure to make the administrator liable *d. b. p.*, see 2 Will. Saund., p. 423 *et seq.* A promise by an executor to make cer-

(e) Throop, Val. Verb. Agreem., § 39, saying that the Statute of Frauds includes "all liabilities resting upon the executor or administrator strictly in his representative character, and which, but for the promise, he would have been liable to discharge only in the due course of the administration of the estate, but not those which were originally incurred by him in consequence of some act of his own, although it was an official act."

(f) In *Harrington v. Rich*, 6 Vt. 673, the point was suggested but not decided, as in fact there was no agreement to discharge the estate. In *Robinson v. Lane*, 14 Sm. & M. 170, parol evidence was admitted to show that the claim against the estate was not a valid one in order to establish

want of consideration for the defendant's promise. In *Mosely v. Taylor*, 4 Dana, 542, a discharge of one jointly liable with the decedent was referred to as showing a consideration for the defendant's promise. In *Templeton v. Bascom*, 33 Vt. 135, the promisor was heir and not executor or administrator, and the forbearance was treated as a new consideration taking the guaranty out of the Statute of Frauds.

(g) *Harrington v. Rich*, *supra*; *Chandler v. Davidson*, 6 Blackf. 368.

(h) *Patton v. Williams*, 3 Munf. § 9.

(i) *Hamilton v. Inledon*, *Kershaw v. Whitaker*, *Holbrook v. Dow*, *supra*; see argument of Byles, J., in *Reader v. Kingham*, 13 C. B. N. S. 352.

(j) *Hackleman v. Miller*, 4 Blackf. 322.

tain payments to the plaintiff, if the latter, in possession of certain land of the testator, and claiming to be tenant, and claiming certain property thereon, would surrender all this, is not within the Statute of Frauds.(k)

§ 162. A plea of the Statute of Frauds, it was held, must aver the want of assets, and this though the consideration of the promise was the plaintiff's forbearance on his claim against the intestate.(l) A demurrer to a declaration setting forth an administrator's written promise, showing as grounds of demurrer that no consideration appears in the writing, or is averred in the declaration, will be overruled, and at that stage of the case the court will presume a consideration.(m) Query, whether an affidavit holding to bail an executor, etc., must state the promise to have been in writing.(n)

Pleading.

§ 163. The evidence of the promise even when written must be clear and unqualified. So in Louisiana, an heir, describing himself in a writing as the legal heir, does not thereby bind himself for the debts of the succession.(o) Letters written by an executor to a creditor of the estate acknowledging the existence of the debt, desiring an extension of payment and expressing a willingness to give his notes with a lien on the estate, to secure their payment, do not sufficiently show an obligation to satisfy the Statute of Frauds.(p)

Evidence.

§ 164. Written admission of assets will bind the administrator personally.(q) at least to the extent of those assets.(r) A bond given by an executor to the probate judge to pay debts and legacies estops the former from denying sufficiency of assets.(s) The suit was

Written admission of assets, and other evidences of a promise.

(k) *Hall v. Richardson*, 22 Hun, 447.

(l) *Pratt v. Humphreys*, 22 Conn. 317.

(m) *Ellis v. Merriman*, 5 B. Mon. 296.

(n) *McAuley v. Innis*, 1 Ir. Law Rec. (N. S.) 70.

(o) *Mumford v. Bowman*, 26 Louisiana, 415.

(p) *Waul v. Kirkman*, 27 Miss. 826.

(q) *Lowndes v. Pinckney*, 2 Strobb. Eq. 44; *Colwell v. Alger*, 5 Gray, 67;

Sample v. Lipscomb, 18 Ga. 687.

Generally as to verbal admission by an executor, see *Pitts v. Shipley*, 46 Cal. 154.

(r) *Lowndes v. Pinckney*, *supra*, (citing *Hall v. Boyd*, 6 Pa. St. 270, and *Irwin's Appeal*, 35 Pa. St. 296); *Sample v. Lipscomb*, *supra*; *Colwell v. Alger*, 5 Gray, 67.

(s) *Stebbins v. Smith*, 4 Pick. 97; *Colwell v. Alger*, 5 Gray, 67; see *Geyer v. Smith*, 1 Dallas, 347.

for a legacy and held to lie, there was no promise given by the executor, but he gave a bond generally to pay debts and legacies, and thereby exempted himself from filing an inventory: this was held to be a conclusive presumption of assets, if the executor had any doubt as to the assets he should have given bond in the common form.^(t) Charging the amount of a debt in his administration account, and procuring an allowance of it by the probate judge establishes a personal liability in the administrator.^(u) That an administrator has charged the estate, and received an allowance as a credit on his indebtedness to the estate, is a strong circumstance against him.^(v) An account against the estate of W. had endorsed on it a written statement signed by W.'s administrators declaring that they knew no reason why the claim should not be paid, and this was marked "admitted and allowed," and signed by the probate judge; the holder of this account wishing to sell it to the plaintiff the latter consulted the administrators, and they said that the account would be paid, and named the probable source of payment, and had no objection to pay it to the plaintiff; on this assurance the plaintiff bought the account. *Semble* that Swenson was endeavoring to get his claim, not out of the administrators personally, but from the estate of W.^(w) Where the plaintiff presented to the administrator an account, and the latter endorsed it, "accepted and will be paid when means sufficient come to my hands," assets being admitted, the evidence was sufficient to make him liable personally.^(x) Where an executor paid interest on a bond due by his testator, this, though not an admission of assets, puts upon the executor the burden of showing that he has no assets.^(y)

§ 165. The submission to arbitration by an administrator as such, of the question of what was due on a bond given by his intestate, is an admission of assets, and will render him per-

(t) *Colwell v. Alger*, 5 Gray, 68.

(y) *Cleverley v. Brett*, cited in *Pear-*

(u) *Trueman v. Tilden*, 6 N. H. 203.

son v. Henry, 5 T. R. 8, note (a). But

(v) *Turner v. Brown*, 3 S. & M. 438.

see *Throop, Val. Verb. Agreem.*, § 34

(w) *Swenson v. Walker*, 3 Tex. 97.

et seq.

(x) *McWhirter v. Jackson*, 10

Humphr. 209.

sonally liable for the amount of the award.^(z) Lord Eldon said, if an executor or administrator think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken, as an admission of assets, it will amount to such admission, and added, "I see no distinction in the case of the assignee of a bankrupt."^(a) It had been held, however, that such a submission was not an admission of assets.^(b) It has been questioned as to whether by parol an executor by submitting to arbitration can make himself liable for a debt of the testator's, though there be no assets unadministered, as he should not have put the parties to the expense of an arbitration when he knew he had no assets; he was estopped to deny that he had assets.^(c) A submission to arbitration by an administrator of a cause of action which arose in the intestate's lifetime, will preclude him from pleading *plene administravit* and thus make him personally liable; but the submission does not transfer the liability from the estate to the administrator.^(d) On the other hand, it has been held that a promissory note given by an executor which showed that it was a mode of submission to arbitration, was no confession of assets, and was *nudum pactum*.^(e) A mere submission revoked by the administrator, defendant, will not bind him.^(f) An award, therefore, seems necessary to fix the administrator's liability.^(g)

(z) Barry v. Rush, 1 T. R. 691; Worthington v. Barlow, 7 T. R. 453; see Holderbaugh v. Turpin, 75 Ind. 85; Toller on Executors (Ingraham's ed.), p. 464; Walford on Actions, p. 1466.

(a) Robson v. —, 2 Rose, 50, citing Barry v. Rush; Pearson v. Henry; Worthington v. Barlow; see Riddell v. Sutton, 5 Bingh. 200.

(b) Pearson v. Henry, 5 T. R. 8, citing Cleverley v. Brett, and distinguishing Barry v. Rush, as a case where the effect of the language was, apart from the question of assets, to bind the administrator personally, the words "as administrator" not being regarded.

(c) Riddell v. Sutton, 5 Bingh. 200.

(d) Reid v. Reid, 16 U. C. C. P. 250.

(e) Schoonmaker v. Roosa, 17 Johns. 304, and see Alling v. Munson, 2 Conn. 691.

(f) Harrington v. Rich, 6 Vt. 673.

(g) Worthington v. Barlow, 7 T. R. 453; distinguishing Pearson v. Henry, as a case where the arbitrator did not order the administrator to pay the debt, but merely ascertained the damages, and deciding in the principal case itself that the award which directed payment raised a conclusive presumption of assets. Walford on Actions, p. 1467; see Throop, Val. Verb. Agreem., § 36, note, saying, that a submission is never within the Statute of Frauds, not being a promise.

§ 166. Upon an account drawn up by a tradesman showing the debt to him due by the testator, and which, though not drawing interest, contained a charge for interest as well as principal, the executors, as such, wrote and signed an agreement to pay the creditor if he would wait for his interest until "the same is settled." The executors were held personally liable, not merely for the interest, but for the principal, since the account contained the charge therefor: *(h)* as the estate was not chargeable with interest, the executors must have intended to bind themselves personally, and the acknowledgment of the account and the promise to pay interest, implied a like undertaking to pay the principal. In a case *(i)* arising before the Statute of Frauds, it was held that while an executor was not bound *de bonis propriis* merely because he accounted with his testator's creditors, yet an accounting upon an express request, and upon consideration of forbearance, shows both the promise and the consideration, and establishes the executor's liability.

§ 167. Making or endorsing a promissory note is a sufficient admission of assets to bind the administrator personally. *(j)* It has been held that a promissory note binds the administrator personally, because, having no power to bind the estate, he must have meant to bind himself. *(k)* Promissory notes or other commercial paper, given by an executor, though for the debt of the decedent, will bind him personally. *(l)* A promissory note payable on *demand*, executed jointly and severally by exe-

Promissory
notes, etc.,
given by
adminis-
trator.

(h) Bradley v. Heath, 3 Sim. 557.

(i) Hawes v. Smith, 2 Lev. 122. An oral promise by an administrator, etc., may be valid to prevent the bar of statute of limitations; see 17 Am. L. Rev., 529.

(j) Thompson v. Waugh, 3 Green (Iowa), 342; Ciples v. Alexander, 2 Constit. Rep. 768; Bank of Troy v. Topping, 9 Wend. 273; 13 Wend. 557; Turner v. Brown, 3 S. & M. 438; Curtis v. The Bank, 7 Harr. & J. 25 (though the suit was against the exe-

cutors as such); Dow v. Worthen, 37 Vt. 112; Davidson v. Rothschild, 49 Ala. 109; Walford on Action, p. 1466; Agnew on Stat. of Frauds, p. 66 *et seq.*; see Bigel. Bills, 48, citing Christian v. Morris, 50 Ala. 585; Toller on Executors (Am. ed.), p. 464.

(k) Winter v. Hite, 3 Coles (Iowa), 142; Greening v. Sheffield, Minor (Ala.), 276.

(l) East Tenn. Co. v. Gaskell, 2 Lea, 744.

cutors as such, imports assets, and binds the executors personally.(m) A promissory note is on consideration of forbearance, and implies assets; and therefore binds the administrator giving it for the debt of his testator.(n) A promissory note signed by the guardian of one *non compos mentis*, in his own name as guardian, and in his ward's name, is sufficient under the Statute of Frauds, as importing a consideration, namely, of assets; this between the original parties to the note is only *prima facie*.(o) A draft accepted by an administrator as such, "to be paid when funds are received for the estate," binds the administrator personally;(p) there was proof of assets. A promissory note stating the consideration to have been "value received by my late husband," binds the maker whether administratrix or not.(q) The assignment of a note with a written guaranty of it by an administrator, in consideration of the holder not seeking to charge the intestate will create a personal liability.(r) Where an administrator signed, as such, the following memorandum: "Due McK. \$90, account against J. S., deceased," judgment was entered *de bonis propriis*, and the defendant having demurred, because no consideration was averred, no question of proof of consideration arose,(s) the court holding such agreement unnecessary. An executor is personally liable on a bond signed as such.(t) *Semble*, that executors who endorse as such a note drawn to their order as executors, are personally liable, and not *de bonis testatoris*.(u) A note given by executors in the firm name, who under the will were carrying on the business, and which was for a debt of the testator, binds them personally, though they did not intend so to be

(m) Childs v. Monins, 2 Br. & B. 460; 5 Moo. 282.

(n) Kerr v. Parsons, 11 U. C. C. P. 514 (citing Childs v. Monins, Ridout v. Bristow, King v. Thom, 1 T. R. 489; Wigley v. Ashton, 3 B. & A. 101; Corner v. Shew, 3 M. & W. 350; Nelson v. Serle, 4 M. & W. 795; Barnard v. Pumfrett, 5 M. & Cr. 63).

(o) Davidson v. Rothschild, 49 Ala. 109.

(p) Carter v. Thomas, 3 Ind. 214; see Bowerbank v. Monteiro, 4 Taunt. 844 (citing cases).

(q) Ridout v. Bristow, 1 Cr. & J. 231.

(r) Robinson v. Lane, 14 Sm. & M. 161.

(s) Ellis v. Merriman, 5 B. Mon. 296.

(t) Geyer v. Smith, 1 Dallas, 347; see *supra*.

(u) King v. Thom, 1 T. R. 489.

bound, and though they did not know the estate to be insolvent.(v) A promissory note signed "administrator," but not saying of what estate, binds the maker personally.(w) Where the contract under which the note was given originated with the administrator, and there is no evidence that the entire matter has not done so, he only is liable and not the estate.(x)

§ 168. The liability of an administrator on his promissory note has been placed on the ground that he cannot bind the estate, and must, therefore, be presumed to have intended to bind himself.(y) In Pennsylvania the broad doctrine has been laid down, that in all cases of promise, express or implied, made to or by an administrator after the death of an intestate, and the same rule holds as to executors, the action lies by and against the administrator personally.(z) But where, in such action, the recovery is limited to the assets, no question of personal liability arises. A method of procedure to be followed where it is desirable to prove an administrator's promise, in order to hold not himself but the estate he represents, was suggested in a Tennessee case, under a declaration containing counts both on the intestate's promise, and also on that of the administrator's, and which alleged an accounting by the defendant; a demurrer to the evidence was filed, and the court said: "Then let it be inquired does the evidence stated in the demurrer conduce to the establishment of the fact of an *insimul computassent* and promise on the part of the administrator? If he promise payment or admit the debt from whence a promise is inferred, the action must be against himself personally and for satisfaction *de bonis propriis*, and the promise must be supported by a sufficient considera-

(v) *Lucas v. Williams*, 3 Giff. 150.

(w) *Tryon v. Oxley*, 3 Greene (Iowa), 289 (citing many cases, and giving the analogy of signature as agent); *Woods v. Ridley*, 27 Miss. 148 (citing *Sims v. Stilwell*, 3 How. (Miss.) 181).

(x) *Davis v. French*, 20 Me. 23.

(y) *Winter v. Hite*, 3 Coles (Iowa),

142 (citing *Childs v. Monins* and other cases).

(z) Vide *supra*; *Solliday v. Bissey*, 12 Pa. St. 347; see, also, *Grier v. Huston*, 8 S. & R. 402; *Woltersberger v. Bucher*, 10 S. & R. 10; *Kline v. Guthart*, 2 P. & W. 490; *Morrow v. Brenizer*, 2 Rawle, 192; *Masterson v. Masterson*, 5 Rawle, 137.

tion, as having assets and forbearance and the like. If you sue upon the *assumpsit* of the intestate, and prove a promise by the administrator after the death of the intestate, that is irrelevant testimony, which does not support the declaration. The right way in such a case is to declare on an *insimul computassent*, which does not subject the administrator personally, being only an ascertainment of a preëxisting demand due from the intestate, and to be satisfied out of his assets. If you sue the administrator, and he plead the act of limitations, you cannot reply he, the administrator, promised in three years, for that is a departure from the declaration, which is founded upon a promise of the intestate.^(a) Therefore you must sue the administrator himself upon his own promise, and must allege an *insimul computassent* and promise thereon, in order to recover against the assets of the intestate, and not charge the administrator *de bonis propriis*. The law from an acknowledgment cannot imply a promise having the latter effect, but will imply an *insimul computassent* and promise, therefore affecting only the assets of the deceased.^(a') To prove, therefore, an admission of the demand is to offer evidence of a circumstance from which the jury may legally infer the *insimul computassent* and promise, and, therefore, the demurrant ought distinctly and unequivocally to admit, in his demurrer to such circumstantial evidence, that the defendant did account with the plaintiff, and promise to pay as stated in the declaration or ought to withdraw his demurrer, and leave it to the jury to decide whether the facts were so or not."^(b)

§ 169. There has been a tendency in certain cases to treat written promises made by administrators as given in an official and not in a personal capacity, as where a note was given by an administrator parol evidence was admitted to show that it was given for the price of land belonging to the intestate estate, so as to establish the consideration of the promise.^(c)

Adminis-
trator not
liable in
certain
cases on his
writing.

(a) See 2 Haywood, 282, 283, where are cited 4 Term Rep., 347; H. Blackst., 104, 108, 110.

(a') See 1 Hen. Bl., 104, 105.

(b) Bedford v. Ingram, 5 Hayw. 162.

(c) Matlock v. Livingston, 9 Sm. & M. 502.

And where the declaration averred that the intestate was indebted to the plaintiff, and that in consideration thereof the defendant promised, the inference is that the promise was given officially, and of this parol evidence may be offered and judgment had against the estate.(d) A written acknowledgment accompanied by a confession of judgment, both being given *quâ* administrator, was held not to bind personally.(e) An endorsement by an administrator of the intestate's written promise will not bind, the executor denying assets, and none being proved.(f) The reason for this decision is to be found in the failure of proof of consideration. Intervention in a judicial proceeding will bind the administrator personally.(g) After verdict on a promise by an administrator it will be taken that the promise was in writing, and that there were assets.(h)

§ 170. The doctrine of part performance having the effect in equity of taking a promise out of the Statute of
 Part per- Frauds has been held to apply to that of an admin-
 formance. istrator; but the case seems to stand on its peculiar circumstances, and to be an attempt to hold the estate of the decedent, and not that of his representative; there was a petition by a creditor to be allowed a lien on the crops of the testator's estate, the petitioners having, under a promise from the executor to give such lien, advanced moneys to the executor; though the advance of the money was regarded as a part performance, the defendant in the court had failed to set up the Statute of Frauds, and on this latter ground the decision mainly went.(i) The part performance was not regarded as effective in a not dissimilar case in Missouri, when the vendee, under a parol contract of sale, sought a special statutory recovery against the vendor's executor, and it was held that a writing was absolutely essential to this particular procedure;

(d) Piper v. Goodwin, 23 Me. 251. Marsh. 238, citing Lair v. Miller, 2 Litt.

(e) Dickey v. Trainer, 43 Pa. St. 66.

511.

(g) Mumford v. Bowman, 26 La.

See, generally, as to confession of Ann. 415.

judgment by executors, Toller on (h) Hawkes v. Saunders, Cowp. 289.

Executors (Ingraham's ed.), p. 464. (i) Daniel v. Trotman, 1 Moore, P.

(f) Rucker v. Wadlington, 5 J. J. C. C. 149.

that if the vendee was to recover it must be in an action joining the heirs and all the parties.(j) A promise by an executrix, that if the co-executors would give her the assets she would pay the testator's debts, is binding when performed by her, and her representative cannot claim to have the debts so paid allowed them as a credit in another transaction between the parties.(k) A part payment by an executrix of a debt of the testator has no effect to bind her personally, the Statute of Frauds requiring a writing.(l)

§ 171. In Indiana it has been said that the consideration of an administrator's promise to answer out of his own estate need not appear in the memorandum.(m) As ^{Miscellaneous.} to how far an executor can voluntarily fulfil an oral invalid contract of his decedent, see the chapter on Voluntary Performance. Generally as to promises by executors to answer out of their own property, see Comstock on Executors, p. 384; Ram on Assets, p. 504 *et seq.*; Alexander's British Statutes in Maryland, p. 524. As to the liability of an executor for the debts of his decedent, see 1 Williams, Saund., p. 220 *et seq.*, and generally so as to bring the case within the Statute of Frauds, see Williams on Exec. (6th Am. ed.), p. 1776 *et seq.* As to personal liability generally of persons acting *en auter droit*, see 1 Amer. Lead. Cas., p. 609; see Holbrook v. Dow, *supra*. As to the liability of an executor on the parol contracts, etc., of his decedent, see Toller on Executors, p. 460. An administrator can by parol submit to arbitration a claim of his intestate relating to promissory notes.(n) By statute in Connecticut (Rev. Stat. 1866, p. 85, § 168) written memoranda made by the decedent are admissible in suits by or against his representatives.(o) Under the Maine act of 1872, c. 85, a claim against an executor for a debt due by the testator must be stated in writing, but need not be signed, and the demand of payment

(j) Schulter v. Bockwinkle, 19 Mo. 649.

(k) Lamport v. Beeman, 34 Barb. 248.

(l) Starke v. Wilson, 65 Ala. 580.

(m) Gregory v. Logan, 7 Blackf. 112.

(n) Alling v. Munson, 2 Conn. 694.

(o) Craft's Appeal, 42 Conn. 153; see, also, Penn. Act Feb. 24, 1834, P. L. 75, and March 10, 1818, § 2, 7 Sm.

79.

may be oral.(p) Under this act a claim must be specially stated in writing, and a presentation of the original evidence of debt, though in writing, as, for example, a promissory note, is not sufficient.(q) As to executor's right of retainer, see Index *ad verbum*. Such a right is not within the Statute of Frauds, hence an executor can pay himself a debt due him by his testator, though such debt is within the Statute; so of an administrator;(r) and an executor can retain a debt due him by the testator, though barred by the statute of limitations.(s) In an English case it was suggested that a right of retainer of an administratrix's debt must be supported by written evidence of the debt, but the point was not directly raised.(t)

The following propositions, which are not, however, undisputed law, may throw light on the difficult subject of this chapter:—

I. An administrator's promise differs from that of a guarantor—

First. In the fact that the existence of a fund in the latter's hands, out of which the guaranty may be met, takes the promise out of the Statute of Frauds; while the administrator's oral promise is not made valid by the possession of assets—the latter are not applicable to the payment of the administrator's special promise to pay out of his own estate. § 153, § 160, § 161.

Secondly. The two engagements differ, also, in this, that the liability of the person answered for ceasing, the Statute of Frauds does not apply to a guaranty, while the non-liability of the estate he represents does not take an administrator's promise out of the Statute. § 154.

Thirdly. The same difference occurs in the case of a promise made in consideration of a lien surrendered by the promisee. § 160-1.

(p) Millett v. Millett, 72 Me. 117; see Stevens v. Haskell, id. 245.

(q) Marshall v. Perkins, 72 Me. 344. Apart from statutory regulation this rule does not obtain; Little v. Little, 36 N. H. 229.

(r) Berry v. Grady, 1 Metc. (Ky.), 556 (citing Roberts v. Terrell).

(s) Crooks v. Crooks, 4 Grant (U. C.) 616.

(t) Harry v. Jones, 4 Price, 97.

II. All engagements by an administrator, etc., for the benefit of the estate he represents, are within the Statute of Frauds.

Except for liabilities incurred fraudulently or carelessly by the administrator, etc.: for matters arising since the death of the decedent: or generally where he is only primarily liable, having a right to ultimate reimbursement out of the estate. § 154.

III. A promise to pay a legacy does not personally bind the administrator, etc., unless in writing. § 155.

IV. The administrator, etc., so far as the assets go, is personally liable, and if he admits the possession of these, he is bound, though in fact he did not get them. § 156. As to the manner of admission of assets, see § 162-7.

V. Assets are a good consideration for a personal promise by the administrator. § 157.

VI. So forbearance by the promisee to sue.

VII. But the surrender of a lien or the discharge of the decedent's estate by the promisee, will not take the administrator's promise out of the Statute. § 160.

VIII. As to how far the administrator may be liable in the first instance, but be entitled to reimbursement from the estate, see § 154 and § 168-9.

CHAPTER VII.

PROMISES IN CONSIDERATION OF MARRIAGE.

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| <p>§ 172. Generally. Before and since the Statute; application of other clauses of Statute; contracts of separation.</p> <p>§ 173. General examples: Wife the creditor of husband; wife's separate estate.</p> <p>§ 174. Some examples of such oral promises being sustained.</p> <p>§ 175. Representations generally; as to facts.</p> <p>§ 176. Encouragement of marriage.</p> <p>§ 177. Representation as to intentions.</p> | <p>§ 178. Oral representation as to future intentions not binding.</p> <p>§ 179. Further examples.</p> <p>§ 180. Part performance generally.</p> <p>§ 181. Full performance.</p> <p>§ 182. Marriage itself not a part performance of a promise in consideration thereof.</p> <p>§ 183. Post-nuptial settlement in fulfilment of an antenuptial agreement.</p> <p>§ 184. The history of the law as to such settlements.</p> <p>§ 185. Memoranda of contract.</p> <p>§ 186. Mutual promises to marry.</p> |
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§ 172. A PROMISE as to pay money, etc., in consideration of a marriage, is within the Statute of Frauds.(a) Even before the Statute of Frauds, if we may trust an entry in Tothill, an oral promise as to a child's marriage portion was, *semble*, not good by custom of

Generally. Before and since the Statute; application

(a) Symondson *v.* Tweed, Prec. Ch. 374; Brownsmith *v.* Gilborn, 2 Stra. 738; *Re* Gulliver, 2 Jur., N. S., 700; 27 L. T. 258; Williams *v.* Williams, 37 L. J. Ch. 854; Andrews *v.* Jones, 10 Ala. 400; Galbreath *v.* Cook, 30 Ark. 422; Cochran *v.* McBeath, 1 Del. Ch. 188; Chase *v.* Fitz, 132 Mass. 360; In the Matter of Willoughby, 11 Paige, 257; Brown *v.* Conger, 8 Hun, 626; Hair *v.* Hair, 10 Rich. Eq. 163.

370 *et seq.*; Davids. Prec., iii. pt. ii. p. 534, n.

As to oral ante-nuptial promises, see Tyl. Inf. and Cov. (2d ed.), § 484; McQu. H. & W., pp. 232-40; 1 McVey Dig., p. 346; see Saunders *v.* Ferrill, 1 Ired. 97, as to No. Car. Act, 1785, Rev. ch. 238 (1 Rev. St. Ch., 37, § 29-30), requiring registration of marriage contracts to validate them as against creditors.

On the general subject of this chapter, see 3 Bac. Abr., p. 574; see 1 Bish. Law of Marr. Wom., § 806-7, 810-1; Schoul. H. and W., § 354, 347,

In Texas every matrimonial contract must, by statute (Pasch. Dig., art. 4633, note 1041), be made by an act before a notary public and two witnesses.

London.(b) This feature of the Statute of Frauds had been to some extent anticipated by previous rulings in chancery; besides the case in Tothill, it had been decided, as early as the seventeenth year of Charles I., that an oral contract in consideration of the marriage by which a wife should have the separate use of certain property of her own was done away with by the marriage itself, and could not be enforced, and that to be valid it should have been evidenced by an assurance good at law.(c) An oral antenuptial promise by the husband, in consideration of the marriage to convey land to the wife, is within the Statute of Frauds.(d) A contract of separation not reduced to writing will not save the husband from liability for the wife's debts; none of the money agreed to be paid by the husband to the wife was shown to have been paid.(e) Where an oral contract with a view to a separation was fully carried out by the parties it will be sustained, the contract being a fair and just one.(f) An antenuptial parol promise made to the intended wife and her parents by the husband that he will not take her away from the parent's neighborhood, cannot be considered in any way in a suit for alimony brought by the wife against the husband based on his desertion.(g) An antenuptial contract, in Massachusetts, is void unless recorded; and *semble* in South Carolina, Kentucky, and Iowa.(h) A contract, in consideration of marriage, otherwise valid, may fall within the "year" clause of the Statute of Frauds.(i) A promise to marry not being within the marriage clause of the Statute of Frauds,

of other
clauses of
Statute;
contracts
of separa-
tion.

(b) Hall v. Lumley, Toth., pl. 44 (Holb. ed.), p. 48.

(c) Suffolk (Earl of) v. Greenville, 3 Rep. in Ch. (Fol.) 50.

(d) Elwell v. Walker, 52 Ia. 262.

(e) Baker v. Barney, 8 Johns. 73.

(f) Dutton v. Dutton, 30 Ind. 454; see § 180 *et seq.*

(g) Hair v. Hair, 10 Rich. Eq. 163.

(h) Ingham v. White, 4 Allen, 412; Stat. 1845, c. 208, § 2; Gen. Stat., c. 108, § 27; Stat. 1869, c. 292; Crock. Annot. Stat. Mass., 2d ed., pp. 291-2;

in South Carolina, see 2 Ril. Dig., 91; in Kentucky, see Harris v. Dale, 5 Bush, 62; in Iowa, Hatch v. Gray, 21 Ia. 31. As to marriage settlements being in writing, see Civ. Cod. Cal. (1874), § 178; as to a married woman charging her estate by a writing, see Baker v. Lamb, 11 Hun, 420; Cohen v. O'Connor, 5 Daly, 28; Meiley v. Butler, 26 Ohio St. 536.

(i) Houghton v. Houghton, 14 Ind. 505; see Derby v. Phelps, 2 N. H. 516; see Sch. H. & W. § 44; see *infra*, § 186.

such a promise, not performable within a year, is within the year clause.(j); a promise, in consideration of marriage, may fall within the land clause.(k) An oral antenuptial agreement between husband and wife, each agreeing to claim nothing out of the estate of the other, is good as against themselves and volunteers claiming under them.(l) *Seem*, a contract before marriage that the offspring thereof shall be brought up in a certain religious belief is within the marriage clause of the Statute of Frauds.(m) Oral contracts, in consideration of marriage, made before the Statute of Frauds, are valid.(n) It was said that, in South Carolina, a parol antenuptial agreement to make a settlement, in consideration of marriage, would be enforced in equity as against parties and volunteers, though *seem* the Statute of Frauds was in force then (1850); the point, however, was dictum.(o) In Connecticut it was held that an invalid parol antenuptial contract is admissible as evidence to show that the husband, by his conduct, meant to give up to his wife his marital rights in her property.(p)

§ 173. The following are some examples of promises coming within the scope of the present subject. Thus a promise to forgive a debt in consideration of a marriage to be had between the debtor and creditor is within the Statute of Frauds.(q) On the other hand, where the wife, several years before her marriage, lent the husband some money, for which she took his promissory note; just before her marriage, she agreed not to sue on it before the marriage upon his promising that if she did not, he would agree that the right of action on the

General
examples :
wife the
creditor of
husband ;
wife's separate
estate.

(j) *Ullman v. Meyer*, 10 Fed. Rep. 241, U. S. C. C. S. D. N. Y., citing *Derby v. Phelps*.

(k) *Rainbolt v. East*, 56 Ind. 538.

(l) *Southerland v. Southerland*, 5 Bush, 593; see, as to the effect of voluntary execution, *Dutton v. Dutton*, 30 Ind. 454, *supra* and *infra*.

(m) *Browne (Re)*, 2 Ir. Ch. 158.

(n) *Otway's Case*, cited in *Gell v. Vermedun*, *Freem. Ch.* 199; *Thornton v.*

Corbin, 3 Call, 389 (before Va. Stat. 1785); *Wall v. Scales*, 1 Dev. Eq. 472, before No. Car. Act 1819; *Gackebach v. Brouse*, 4 W. & S. 547, before Pa. Act 1855.

(o) *Hatcher v. Robertson*, 4 Strob. Eq. 182.

(p) *Sanford v. Atwood*, 44 Conn. 143.

(q) *Flenner v. Flenner*, 29 Ind. 569; *Henry v. Henry*, 27 Ohio St. 128.

notes should not be taken away by the marriage, and that the notes should be good against his estate, it was held, in an action by the wife against her husband's heirs on the note, that the promise to keep alive the notes was not one in consideration of marriage, and so within the Statute of Frauds, the marriage having been agreed upon independently, but upon the consideration of forbearance by the wife to sue on the notes before the marriage, and it was held, therefore, that the Statute of Frauds did not apply.(r) Where a feme sole, designing to marry, gave a bond to her intended husband, engaging in case of their marriage to give him the lands in fee, and afterwards the parties married, it was held that the bond was a sufficient memorandum of the agreement, and could be enforced after the wife's death against her heirs.(s) A promise to give a woman a certain sum of money if she will marry the promissor is within the Statute of Frands, and the promise to marry is not severable from the rest of the engagement.(t) An oral promise by a husband before marriage to settle the wife's property upon herself is within the Statute.(u) So a promise by the husband, in consideration of his wife renouncing her dower, that she should enjoy her estate as if sole.(v) So, in Kentucky, a promise that the wife should retain her title in her slaves and have full control over them.(w) Where an intended husband and wife had, it was claimed, made a certain agreement relating to slaves, but the understanding between them was not reduced to writing, so the pleading showed, because the parties believed that the provision of the will of a certain relative would be operative at law to carry out their purpose, it was held that the Statute of Frauds applied, and that, apart from the Statute, the case showed that the parties had not made a contract, believing

(r) *Riley v. Riley*, 25 Conn. 154.(s) *Cannel v. Buckle*, 2 P. Wms. 243.(t) *Cushman v. Burritt*, 14 N. Y. Week. Dig., 59, S. C. N. Y.(u) *Spicer v. Spicer*, 24 Beav. 367;*Bradley v. Saddler*, 54 Ga. 682; *Beaumont v. Carter*, 32 Beav. 586.(v) *Finch v. Finch*, 10 Ohio St. 505.(w) *Potts v. Merritt*, 14 B. Mon. 406; Ky. Stat. of 1796, p. 734; Rev. Stat., chap. 22, § 1; see *semble contra*, *Southerland v. Southerland*, 5 Bush, 593.

none to be necessary.(x) An oral promise before marriage to settle the wife's property upon herself, being within the Statute of Frauds, and one after marriage being without consideration, a deed fulfilling the promise is a voluntary one.(y)

§ 174. But such promises as the above have, under slightly different circumstances, been sustained. Thus, in Indiana, a promise between betrothed persons not to claim legal rights of a survivor in the estate of each other was held not to be an agreement in consideration of, nor in contemplation of, marriage, for the question of the marriage had been already settled.(z) It would seem that a fundamental distinction has been ignored; no one should doubt that an agreement in consideration of marriage within the meaning of the Statute can be made by betrothed persons, and this attempt to limit the Statute to promises where the contract in consideration of the marriage and the contract to marry are consentaneous is without justification. But the court probably had in mind those cases where an oral promise is sustained because in reliance thereon a marriage is had, the promise being held to be a representation; the corollary of this is, of course, that where the contract to marry, or certainly where the marriage itself is entered upon before the representation is made, it cannot be said that there was any reliance upon the latter. Pushing the doctrine of representation (see § 175 *et seq.*), a doubtful one at best, to its furthest limits, it will not cover the case in question. Indeed, it may be argued that the fact that the contract to marry having been previously made, if of any effect, would rebut the idea of the promise not to claim the marital rights being a representation relied on in the marriage, and thus take away the only possible ground for supporting the latter promise; in the Indiana case the promise covered certain real estate, and being held inseverable, the "land" clause of the Statute of Frauds was held to apply; we may, perhaps,

Some
examples
of such
oral
promises
being sus-
tained.

(x) *Montgomery v. Henderson*, 3 Jones, Eq. (No. Car.) 114, citing *Dunn v. Tharp*, 4 Ired. Eq. 7; 1 Rev. Stat., c. 50, § 8. (y) *Lloyd v. Fulton*, 91 U. S. S. C. 483; see *Borst v. Corey*, 16 Barb. 136. (z) *Rainbolt v. East*, 56 Ind. 538, citing *Riley v. Riley*, 25 Conn. 154.

therefore regard the ruling first given above as being dictum. An example of a promise which was not in consideration of marriage, but really upon another consideration, will help to show the error of the Indiana decision. In a case before the House of Lords, where the plaintiff, whose bond was held by the defendant, who also held land under a conveyance from the plaintiff's father, which it was claimed was to a great extent merely voluntary, and who stated, upon being threatened by the plaintiff's father that he would attack the conveyance, that she would not enforce the bond—the plaintiff during the negotiation of whose marriage much discussion about the defendant's bond had taken place married thereafter—it was agreed by the court, Lords Cranworth, Brougham, and St. Leonards, that, while they differed on the point whether the defendant's declaration of intention bound her as a representation, the contract not to enforce the bond, if it were a contract, was not on consideration of marriage.(a) Personal property given to the wife by the husband before marriage is not taken under a contract in consideration of marriage.(b) The case which comes nearest to *Rainbolt v. East* is one in New York, in which the court thought the following contract rather one relating to land than in consideration of marriage, viz: where a woman in contemplation of her marriage, and of her husband conveying her certain land, paid his debts, and after marriage he conveyed to her, and this conveyance was upheld as against his subsequent creditors.(c) A parol antenuptial agreement that the wife's personal property should remain to her separate use is good so far as to make the property the wife's after the husband's death, though he had taken it into possession and put it out at security in the wife's name.(d) Where a contract to settle the wife's property upon herself is after marriage carried out, it may be sustained.(e)

(a) *Jordan v. Money*, 5 H. L. C. 216, citing a number of cases of representations; Lords Cranworth and Brougham thought the representation one of intention, not of fact; Lord St. Leonards thought it binding.

(b) *Child v. Pearl*, 43 Vt. 224.

(c) *Dygert v. Remerschnider*, 32 N. Y. 629.

(d) *Flowers v. Kent*, Brayt. 238.

(e) *Luders v. Anstey*, 4 Ves. Jr. 501; see *infra*, § 180 *et seq.*

§ 175. The branch of our subject next in logical order is the perplexed and unsatisfactory one of those promises in consideration of marriage, which have been withdrawn from the operation of the Statute of Frauds because they were regarded as representations which had been so acted upon by at least one of the parties thereto, as to make a refusal to complete the contract inequitable. This is, indeed, an application of the doctrine of part performance to the contracts now under discussion, but the propriety of such an application as this has been so often questioned, that it will be better to dispose of this sub-head of "representations" before taking the general subject of part performance as relating to contracts in consideration of marriage. It may be said then it is generally true that representations on which a marriage is had are upheld in equity on the ground of fraud (*f*) and where there is no fraud, the rule does not apply. In *Bawdes v. Amhurst*, "my lord chancellor" (Cowper) said that he "had always been tender in laying open that wise and just provision parliament had made" (*i. e.*, the Statute of Frauds), and he distinguished *Mallet v. Halfpenny* as a case of fraud, adding that he "remembered Halfpenny walking up and down the court, bidding the master of the rolls (Sir John Trevor) mind the Statute, to which the latter answered him humorously, I do, I do!" (*g*) There are three classes of cases which come within the limits of this exception: First, misrepresentations or concealment of facts; secondly, the active encouragement of the marriage by the defendant; and thirdly, mere representations as to intention. The first class gives rise to little doubt; actual fraud will in equity break through any law that is not penal or political in character, through any law written or unwritten which goes only to the right of the parties, and has no public object to serve apart from doing justice between man and man. The various phases of the early case of *Montacute v. Maxwell*, illustrate the effect of fraud upon contracts in con-

(*f*) *Andrews v. Jones*, 10 Ala. 400; see generally as to representations, 3 *Ogden v. Ogden*, 1 Bland, 287; *Williams v. Williams*, 37 L. J. Ch. 854; *Warden v. Jones*, 2 De Gex & J. 76; *Dauids. Con.*, 534, n. (*g*) *Prec. Ch.*, 402.

sideration of marriage. In this case, as reported in Peere Williams, the chancellor said that fraud(*h*) was an exception to the Statute of Frauds, mere breach of the oral contract not being such fraud, and added that there were circumstances to indicate that the contract before the court had not been signed, owing to direct fraud. In the report in Precedents in Chancery, it was said that the wife was fraudulently induced to marry before the settlements were ready.*(i)* In the report in the Equity Cases Abridged, it was added that the husband privately countermanded the marriage articles.*(j)* As will be seen hereafter, mere haste, however unseemly, in making the marriage, will not, without more, take an oral contract out of the Statute of Frauds.*(k)* The commonest instance of direct fraud is, as has been said, the misrepresentation or concealment of a fact. Thus, where a mortgagee stands by and allows a marriage settlement to be made without disclosing that he has the encumbrances on the lands, he is estopped to set up the mortgage, and will in chancery be ordered to convey the mortgage in trust to carry out the settlement.*(l)* Where a parent, having an interest in property of her son, represented in a marriage treaty the property to be her son's, and that he was not indebted to any one, she was not allowed to enforce a bond which the son gave her for her interest in the property.*(m)* Where a husband misrepresented the tenor and legal effect of a marriage settlement, and the lady, relying upon this, married, the settlement was in a Georgia case in equity afterwards corrected.*(n)*

§ 176. The second class of cases is that in which the defendant, who has been active in bringing about the marriage, and who has induced the parties to enter into it, refuses to fulfil the promise which forms an inducement thereto. In a case in Viner the facts were as fol-

Encouragement of the marriage.

(*h*) 1 P. Wms., 618.

(*i*) Prec. Ch., 526.

(*j*) Eq. Ca. Abr., 19.

(*k*) See *infra*; see Beaumont v. Carter, 32 Beau. 586.

(*l*) Berrisford v. Milward, 2 Atk. 49.

(*m*) Scott v. Scott, 1 Cox Ch. 366; see cases cited; see Redman v. Red-

man, 1 Vern. 348; Neville v. Wilkinson, 1 Bro. C. C. 543, and cases cited in notes thereto; see § 174, Jordan v. Money, where the law lords differed as to whether a certain promise was such a representation as would bind.

(*n*) Durham v. Taylor, 29 Ga. 176.

lows:(o) A father encourages the courtship of his son with another's daughter, who proposes by letter to give her £500, if the father would settle £100 per annum on the son, which is refused. The son and daughter marry privately, and after this the letter was written, then he that refused consented, and he that consented refused. On a bill for performance of this agreement, it was objected, that these promises were within the Statute of Frauds, and that the letter being after the marriage should not bind; but decreed *contra*, on circumstances of the father's privity and consent to the match and of marriage, by afterwards approving of it. That it was out of the Statute, if no letter for the agreement is admitted by the answer, but this case does not depend on parol evidence or admission; for the letter after marriage considering the transaction before, is sufficient. The case of *Halfpenny v. Ballet*, already spoken of, was as follows:(p) The plaintiff, before his marriage with the defendant's daughter, signed a settlement, and delivered it to Ballet, but he, according to his answer, never signed, but tore it up, his objections not being to material parts of the settlement, and having permitted the courtship and the marriage to be had, and not expressing any dislike till payment of his daughter's portion was asked for, and having permitted the young couple to live with him, the payment of the portion was decreed (according to this the defendant was Ballet). S. C., *sub nom.* *Mallet v. Halfpenny*, cited in (*Bawdes v. Amhurst*) *Prec. in Chanc.* 404, the facts are given differently; there it is that the defendant (here called Halfpenny) had signed the settlement, but had afterwards persuaded his daughter to wheedle the plaintiff out of it, and connived at the marriage. In another case, where the defendant wrote a letter stating what he would settle on his daughter, and a settlement was afterwards drawn by an attorney, but not signed, but there was evidence that both parties agreed to its terms, the court, inclining to dismiss the bill, gave the plaintiff leave to try it at law, and afterwards further resort to be had to chancery. Upon a new bill

(o) *Hodgson v. Hutchenson*, 5 Vin. (p) 2 Vern., 373; *Prec. in Ch.*, 404
Abr. 522, pl. 34.

brought by *Cookes et ux.* against *Cookes's* father, and *Mascall*, the wife's father, *Cookes's* father offered in answer to perform; the facts being the same as in the former case, and it also appearing that the defendant had assisted his daughter to marry the plaintiff, it was decreed that the settlement drawn by the solicitor to be executed by the defendant, though it was not signed, and though it was said there was no other agreement reduced to writing (query, the letter spoken of above being done away with by subsequent negotiations).^(q) Where the plaintiff proposing to marry the defendant's daughter, a third person, by the defendant's consent, and with his subsequent knowledge, writes the plaintiff, proposing a certain marriage, and a negotiation for a settlement is then begun, but being delayed, the plaintiff married the defendant's daughter; the lord keeper held that the Statute of Frauds did not apply. Shortly before the marriage, the defendant said he would give nothing; but the lord keeper said that when the couple's affections were engaged, and they were ready to go to church, it was too late to give a refusal.^(r) An uncle wrote promising £1000 with his niece, but dissuading her in the same letter from marrying the plaintiff; he, however, gave her away at the ceremony, the husband could not recover the money in equity, but was left to his action at law.^(s)

§ 177. The two cases last cited might perhaps better be ranged with those belonging to the third class already defined, that, namely, which comprises representations merely as to intention. However doubtful on principle, the law of England has certainly declared the validity of an oral representation as to future intentions, though they amount to no more than, if indeed to as much as, an ordinary promise. Nor is the evidence as to reliance thereupon always satisfactory, unless we admit, what is everywhere denied, that the fact of marriage itself is such reliance. The following are the most extreme cases, and are those

Representation as to intentions.

^(q) *Cookes or Cokes v. Mascall*, 2 Vern. 34; S. C., id. 201. 201, citing *Hart v. Moore*, 2 Ch. Rep. 284; 1 Vern. 110; *Cookes v. Mascall*, 2

^(r) *Wanchford v. Fotherley*, 1 Eq. Vern. 34; 1 Eq. Ca. Ab., 22.

Ca. Abr. 22; 2 Vern., 322; *Freem. Ch.*, ^(s) *Douglas v. Vincent*, 2 Vern. 202.

which are strictly examples of mere representations or promises without any feature of estoppel or fraud. It will be noted, however, there are writings more or less full in every instance. Thus, where the plaintiff's father contemplating a marriage about to be made by him, the plaintiff's father, tells the lady's father that he understood that she has a certain interest in her parents' property, subject to a power of appointment possessed by the defendant, and the latter assures the plaintiff's father that he will not exercise the power of appointment, and the attorney for the lady and her father writes the attorney of the plaintiff's father that the lady's interest in her parents' property is a certain amount subject to a power of appointment in her parents which they do not propose to exercise, and a settlement was executed by the plaintiff and the lady reciting her interest as subject to the power, and the instrument is stamped as being for an amount which must have included the above described interest; it was held that even as against the plaintiff, his grandparents, the parents of the mother, could not exercise the power to his disadvantage.(t) Where a representation is actually made as shown by clear proof, and under circumstances to show that it was this that influenced the conduct of the contracting parties, and there is reasonable certainty as to the amount and nature of the property to which the representation is applied, it was held that a settlement verbally promised in consideration of marriage (which latter was proved by parol evidence, as well as by letters of the benefactor, to have been in consideration of the settlement), would, after the lapse of many years, be decreed to be performed. There were acts done by the promisor in regard to the estate indicating that in spite of the promise he still considered himself the owner, but following *Hamersley v. De Biel*, where the same thing appeared, it was held that this was not necessarily inconsistent with a promise to will the property in a certain way; a representation such as the above, though it were to do a certain act by a revocable instrument, is binding.(u) Where a niece who was

(t) *Walford v. Gray*, 13 W. R. 335, *Hamersley v. De Biel*, and *Luders v. Anstey*, in the latter case a mere suggestion for consideration followed by a

(u) *Prole v. Soady*, 2 Giff. 20, citing

taking care of her uncle learned that his will gave her but a small legacy threatened to go unless he was more liberal, he then made and showed her a codicil, which satisfied her, and she stayed; it was held that he could not revoke the codicil, a representation had been made to which he was bound, she having acted on it.(v) Where during the negotiations relating to a marriage, proposals in writing, and signed, are sent by the proposed bridegroom's uncle to the representatives of the intended bride and the request made that the nephew shall be received as a suitor, to which no answer is returned, but the nephew is received and the proposed marriage takes place, it was held that this in equity amounted to an agreement executed, and ought to be performed on all sides.(w) In *Hamersley v. De Biel*,(x) *Bold v. Hutchinson*,(x¹) and *Laver v. Fielder*,(x²) there were written memoranda sufficient to satisfy the Statute of Frauds. The English rule supporting these oral representations does not apparently extend to those made by the husband or wife to the other, or the family of the other. Thus A., on Tuesday, writes B., the trustee of C., that he is about to marry C., and that the wedding takes place on Saturday, and using in the letter these words: "I especially wish it (C.'s property) entirely settled on herself." No settlement was executed, and A. married C. on Wednesday, the next day. It was held that this letter did not bind either A. or C., and that its utmost effect would be in justifying the trustee waiting for an opinion of the court, C. being still a minor.(y) But a late case is to a somewhat different effect, and where the first of the letters given below in the note, was written by C. M., the lady's relative and trustee, to the intending husband; the second was written by the latter to the

marriage, was held to be binding, see *Lant's Appeal*, 95 Pa. St. 279.

(v) *Loffus v. Maw*, 3 Giff. 604; see *Coles v. Pilkington*; *Loffus v. Maw* was much criticized in *Humphreys v. Green*, 10 Q. B. D.

(w) *Parker v. Sergeant*, Ca. Temp. Finch, 147.

(x) 12 C. & F., 73 (Dom. Proc.) affirming S. C. below, before M. R., 3 Beav., 469, and before L. C., 12 Cl. & Fin., 63 n.

(x¹) 5 De G. M. & G. 558, before L. C., affirming M. R., 26 Beav., 250, citing cases.

(x²) 32 Beav., 1, and so in *Crofton v. Ormsby*, 2 Sch. & Lef. 590, and *Alt v. Alt*, 4 Giff. 84, where the evidence showed a marriage had in reliance upon the contract.

(y) *Beaumont v. Carter*, 32 Beav. 586.

solicitor of the former, Malins, V. C., who said that “these cases, with regard to contracts made before marriage are always cases which savor of difficulty,” held that the memoranda were sufficient, inasmuch as C. M. must be supposed to have relied upon the husband’s letter in permitting the marriage.^(z) In a comparatively recent Massachusetts case, there is a dictum in which the court, referring to agreements of marriage settlements, says: “In such cases, the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation, that, if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute.^(a) Where a husband before marriage promised to make a certain settlement on his wife, but failed to do so, and instead conveyed his property to the children of his previous marriage, reserving a life estate to himself, oral evidence was in a Kentucky case admitted on the ground of fraud.^(b) In a modern English case, Vice-Chancellor Stuart said, that this doctrine was the most difficult and important, and the most perplexed by authority of any of the heads of equity. He thought the weight of authority to be with *Hamersley v. De Biel* . . . a representation clearly proved and relied on should bind. The marriage was contracted, said the Vice-Chancellor, on the faith of the representation, and the present case taken out of the

(z) *Viret v. Viret*, 43 L. T. N. S. 494; the notes were as follows :—

Dear Mr. Viret: Thanks for your note, but it has made me anxious. I cannot understand the delay, but I trust to you that all will be done as we should desire; and if from any cause you are tempted to marry before the settlements are signed, you will before the wedding write a letter to our solicitors contracting to settle on Constance all her fortune coming to her eventually.

The second letter was :—

Dear Sir: I write the following letter

in accordance with the Rev. C. Mackenzie’s wish. In the event of my marriage with Miss Wright taking place before the settlements are ready, I agree to Miss Wright’s fortune being settled on herself, subject of course to certain conditions, chiefly relating to myself and the children of our marriage (if any, or otherwise in case Miss Wright should predecease me).

(a) *Glass v. Hulbert*, 102 Mass. 38, citing *Montacute v. Maxwell*, Browne on S. of F. § 441 *et seq.*

(b) *Petty v. Petty*, 4 B. Mon. 217.

Statute of Frauds by part performance.(c) It is to be remarked that in this case one parent paid all that he promised to the young couple, and that the other who was sought to be charged made his son his executor; it was held that the latter could retain out of the assets in his hands the unpaid residue of the amount agreed to be paid by the testator. As will be seen elsewhere, an executor's right of retainer is not within the Statute of Frauds at all.

§ 178. Not only has it been decided that mere representations as to future intention are within the Statute, but some of the authorities so holding would appear to be opposed to allowing the fact of reliance, upon the representation being made, a reason for limiting the rule.(d) In a case at the Rolls it was held that a parol promise to make a settlement upon a daughter about to marry does not bind the promissor where no step relating to the marriage was taken in reliance upon such promise.(e) In an early case where a father wrote to his daughter consenting to her marriage with A., and stating that he had met the plaintiff and had agreed to give £3000, the marriage was entered into; but before the marriage the father died, and by his will, made long before the treaty of marriage, gave his daughter but £2000. The daughter having never shown the plaintiff her father's letter, the Lord Chancellor held that the plaintiff's case was not made out, inasmuch as he, the plaintiff, could not have married relying upon the letter, as he never knew of it, and as he had accepted the £2000 at the

Oral representations as to future intention not binding.

(c) *Williams v. Williams*, 18 L. T. N. S. 785; 37 L. J. Ch., 854, questioning *Caton v. Caton*, and *Jorden v. Money*, and relying on *Hamersley v. De Biel*, and distinguishing (*In re*) *Gulliver*. See *infra*.

(d) *Hackney v. Hackney*, 8 Humph. 452.

(e) *Goldcutt v. Townsend*, 28 Beav. 450; it was said that *semble* the case was ruled by *Money v. Jorden*, that *De Beil v. Thomson* did not apply. That *Dundas v. Dutens* was no longer law under *Randall v. Morgan*, Las-

sence *v. Tierney*, and *Warden v. Jones*; it was doubted whether Lord Thurlow, in *Dundas v. Dutens*, meant to decide that a parol antenuptial promise can support a post-nuptial settlement. And *Surcome v. Pinniger* was distinguished on the ground that there the marriage was made the condition of the promise, and was entered into on account thereof; and *Barkworth v. Young* was distinguished on the ground that there the promise was the inducement to the marriage; and the case was said to be like *Money v. Jorden*.

death of her father, and did not demand more. See *S. C.* (9 *Mod.* 3), where nothing is said as to the letter, and the case is rested on the plaintiff having accepted the £2000, and intimating that when the plaintiff married he knew of the father's will.(f) Where a donor has made it perfectly clear as to how much he binds himself to settle on his daughter about to marry, vague promises of more are not binding, though trusting to them the husband married.(g) In another instance, where the only evidence was a correspondence, the court held that the letters were evidently not final, but merely a vehicle of discussion, and the contract was confined to the settlement; the fact that in one passage of the settlement the share which the daughter of the defendant's testator *will* receive on the death of her father is spoken of, and in another passage the phrase occurs, "any property she may succeed to during," etc.; the marriage does not create the inference that the daughter had existing rights in her father's property, so as to bind the latter by his letters written pending marriage negotiations, under which the supposed rights of the daughter must arise.(h) A case like this last was decided in the court below on the ground that the letters (*q. v.*), though they showed an intention that the daughter should by will have her share of her parent's estate, yet showed that this arrangement was on the theory of her surviving her parent, which she did not do. The language of the letter by the father to the husband was: "With all we possess would be divided at our death" (the parents' death) "equally among our children." By the father to the husband's mother was: "I told him" (the husband), etc., "offered to leave them" (wife and husband) "a third part of all we possessed at our decease;" answer of husband's mother was: "Depending on your promise that Emily" (the wife) "will have her equal share at our death." The father also wrote to the husband: "We" (the parents) "are ready to leave her at our decease a

(f) *Ayliffe v. Tracey*, 2 P. Wms. 65; 9 *Mod.*, 3.

(g) *Moorhouse v. Colwin*, 15 *Beav.* 349.

(h) *Sands v. Soden*, 10 W. R. 765. *Hamersley v. De Biel*, was distinguished

on the ground that the marriage took place on the faith of the preliminary correspondence; and the omission from the settlement of that part of the contract, which appeared in the letters, was accounted for in the principal case.

due proportion of all we have." It was said that where a letter is written expressing an intention to make a certain settlement, and a marriage takes place on the faith of this promise, a court of equity might, perhaps, enforce the settlement; but where a deed of marriage settlement is executed before the marriage, in which nothing is said as to the terms contained in the letter, it was held that in absence of fraud or mistake these could not be allowed as against the deed. The Lord Chancellor Campbell, in *De G. F. & J.*, said that "if there had been no deed, and the marriage had taken place on the faith of the correspondence, a court of equity might have held that the marriage had taken place on the correspondence; the parties were bound by it, though it is difficult to say from the letters whether and at what time they constituted a contract binding on Mr. Heath, the father; but the existence of a deed like that in the other case renders it unnecessary to decide the point." (i)

§ 179. The interesting case of *Caton v. Caton* shows as harsh an application of the Statute of Frauds as can be well imagined, and yet the propriety of the decision is almost beyond question, as an obedience to the commands of the Statute of Frauds; it is one instance of a refusal by an English court of equity to stretch the doctrine of representation as to intention, so as to make the Statute a dead letter. The facts of this case were as follows: Mrs. Caton before her marriage agreed with Mr. Caton, her proposed husband, that her property should be settled on herself, and a memorandum was prepared by him in his own handwriting, as the basis of a draft of settlement; it began: "In the event of marriage between the undermentioned parties," and in each of the provisions is mentioned either the name or the initials of the two parties. Several changes were made in the provisions of the agreement, and finally Mr. Caton, objecting to the expense of engrossing the settlement, asked his proposed wife to give up the settlement, and that he would will her her whole property, and make further pro-

Further
examples.

(i) *Loxley v. Heath*, 1 *De G. F. & J.* 489; 27 *Beav.*, 523; *Hamersley v. De Biel* being distinguished.

vision out of his own estate; the counsel for the lady wrote urging her to insist on a settlement; the parties were married, and in the vestry Mr. Caton executed a will carrying out the previous agreement. This will he afterwards revoked, and made for his widow a poorer provision than she would have had if she had retained her own property; and Stuart, V. C., held that the execution of the will was a part performance which took the case out of the Statute of Frauds; and that Mr. Caton was bound by the representations under which Mrs. Caton gave up the settlement. In the House of Lords Mrs. Caton abandoned the ground on which the Vice-Chancellor went, and contended that the memoranda were sufficient. Lord Chancellor Cranworth had on the appeal reversed the Vice-Chancellor on the first ground, and the House of Lords affirming the Lord Chancellor's decision, denied that for either reason the case was taken out of the Statute.(j) Where the guardians of a young lady refused their consent to her marriage with A. till A.'s uncle had declared what he would do for him in the way of property, A.'s uncle, though several times requested to make a settlement upon A., said that he would never bind himself in such a manner, but that in his will, which was then in existence, A. was to get from him, the uncle, a certain large estate in Tipperary; the marriage thereupon took place with the guardian's consent. It was held that this reply, together with the fact that the uncle signed with the other parties as trustee a deed of marriage settlement, in which A. bound himself to make a certain disposition of the land which he should receive from his uncle, did not bind the uncle to make the settlement, and that a devise

(j) Before the V. C., L. R., 1 Ch. App. 140; 34 L. J. Ch., 564, citing *Chamberlaine v. Chamberlaine* (see 35 L. J. Ch., 293), as to whether this case was before the Statute of Frauds or not; but it was certainly decided in Easter Term, 1678, and after the Statute; see 2 Freem., 34; 2 Eq. Ca. Abr., 43, 465; another suit *semble* in the same family was decided in 1674 or 1676, see 2 Freem., 141; 1 Chan. Ca., 256, and

distinguishing *Lassence v. Tierney*. Before the Lord Chancellor, 35 L. J. Ch., 292; L. R., 1 Ch. App., 146; distinguishing *Strickland v. Aldridge*; *Sellack v. Harris*, as cases where those against whom recovery is sought, had induced the other parties to rely on representations, etc.; here the heirs had done nothing. In Dom. Proc., L. R. 2 H. L. 135; 36 L. J. Ch., 886; 16 W. R., 1.

of the Tipperary property to other third persons would not be interfered with.^(k) Where in a letter inclosing a settlement made upon the marriage of the settlor's daughter, the writer expresses certain ultimate intentions as to the disposition of his property, and this letter reached the beneficiary the day of the wedding, and it appeared that the settlement and the letter were unsolicited; it was held that the writer was not bound by the expression in the letter, either as a contract or a representation; the marriage not having taken place on the faith of them, and the letter being accompanied by the real settlement.^(l) In a Maryland case, it was held that where the uncle of a lady engaged to be married writes to the father of the intended husband that the engagement has been formed, and that he intends to make such and such provisions for the lady, that inasmuch as the betrothal having been previous, it could not have been in consequence of the uncle's proposal as evidenced by the letter, and that a mere expression of intention without more, and upon which nothing was done by the person in whose favor the intentions were, did not bind as a contract. Where induced by a promise, one enters into a marriage, the contract is performed by the promisee, and he can recover on the representations against the promissor.^(m)

§ 180. It has already been said that on the ground of fraud a contract in consideration of marriage is taken out of the Statute of Frauds when partly performed.⁽ⁿ⁾ Possession and improvements of land are sufficient part performance.^(o) Possession alone, also.^(p) But where a

Part performance generally.

(k) *Maunsell v. White*, 4 H. L. C. 1039, considering and distinguishing *Hamersley v. De Biel*; and saying that *Wankford v. Fotherly* is better reported in *Freem. Ch.*, 200, than in 2 *Vern.*, 322.

(l) *Kirwan v. Burchell*, 10 Ir. Ch. Rep. 63; as another example of an insufficient promise, see *Quinlan v. Quinlan*, H. & Jones Ir. Rep. 792, citing cases. See *M'Askie v. M'Cay*, Ir. Rep. 2 Eq. 451; 16 W. R. 1188, *infra*, doubting whether under *Jorden v.*

Money, expressions of future intention should as false representations estop.

(m) *Ogden v. Ogden*, 1 Bland, 287.

(n) *Bradley v. Saddler*, 54 Ga. 682.

(o) *Surcome v. Pinninger*, 3 De G. M. & G. 571; 22 L. J. Ch. 421, citing *Hamersley v. De Biel* and *Taylor v. Beech*, 1 Ves. Sr. 297, and distinguishing *Lassence v. Tierney* as a case where there was no part-performance except the marriage. See Part Performance.

(p) *Dygert v. Remerschnider*, 32 N. Y. 629 (*semble*); *Coles v. Pilkington*, L. R. 19 Eq. 178.

woman promised a man that if he would marry her and enter upon and improve the land, she would convey it to him. The husband improved the land, but the improvements were held to be insufficient part-performance, because his possession was that of husband and not that of vendee.(g) Giving instructions for drawing settlements is insufficient, even when title-papers are given to a solicitor for the purpose, and though the direction is partly carried out.(r) Payment of interest on a marriage portion is not sufficient part-performance.(s) It was held that where, in consideration of a particular marriage, a person promised by parol in an informal discussion to pay the interest on a certain sum of money to his daughter during her life, and after her death that the principal should go to her husband, and several payments of the interest were made, but at irregular intervals, it has been held that, being by parol, this contract was within the Statute of Frauds, and that the payment of interest was not part performance under the circumstances.(t) On the contrary, the payment of money seems in the following case to have been regarded as sufficient part performance. When the claimant and his wife, contemplating marriage, the lady's father agreed to settle on her £200, on condition the claimant's father will settle on him the same amount, and the lady's father paid over the £200, and the claimant's father paid over £50 and died, leaving the claimant his executor, it was held that the contract, being partly performed, the claimant could retain £150 out of the assets of his father's estate.(u) Where, under an oral antenuptial contract, a wife is permitted by her husband to use her property as if sole on consideration of giving up her dower, the fact that she did enjoy her property uncontrolled, and made gifts of some of it (*semble* personalty), is no part

(g) *Henry v. Henry*, 27 Ohio St. 128, Gulliver, 2 Jur. N. S. 700, distinguishing *Finch v. Finch*, 10 Ohio St. 505.

(r) *Montacute v. Maxwell*, 1 P. Wms. 618; *Redding v. Wilkes*, 3 Br. C. C. 401; *Bawdes v. Amherst*, Prec. Ch. 402.

(s) *Barter (ex parte)*, Mont. Cas. in Bank. 135.

(t) *Gulliver (Re)*, Stroughill v

(u) *Williams v. Williams*, 37 L. J. Ch. 854; 18 L. T. N. S., 785. See § 177 and n. (c).

performance to sustain the contract as against her claim for dower, her possession was not exclusive of that of her husband. (v) The manual delivery by a wife to her husband, of notes payable to herself, though he did not collect the amount of them, or have them endorsed to him, was considered a sufficient performance of an antenuptial promise to give them to him; one judge dissenting as to this. The husband would, *jure mariti*, have had the right to these choses in action apart from the contract, but he would, at law, have had to reduce them to possession, otherwise they would go to the wife's representatives; under the contract he was to pay the wife certain pin money. (w) Where a widow put the shares of the husband's estate, which he had devised to their daughters, into trade, and married a second time, and she and her second husband continued to use the money in trade, and the second husband orally promised the suitor of one of the daughters that the latter's portion should amount to a certain figure, and afterwards paid a large part of the amount, this, so far as paid, was good against the step-father's creditors. The contract within the Statute of Frauds, binding in conscience, could be carried out; but a bond, executed long after the first promise, but not delivered to the daughter or her husband for the unpaid balance, was not binding, as it appeared not to have been delivered, nor to have been asked for by the daughter or her husband. (x)

§ 181. The doctrine that voluntary or full performance takes a contract out of the Statute of Frauds, applies to agreements in consideration of marriage; an administrator is not obliged to set up the Statute to a claim on such a contract. (y) The want of a writing does not make a contract in consideration of marriage void or illegal, it is only a matter of evidence. (z) In Indiana an

Full performance.

(v) *Finch v. Finch*, 10 Ohio St. 505, distinguishing *Crane v. Gough*, 4 Md. 322, as a case of *fully* executed contract. But *Houghton v. Houghton*, 14 Ind. 505, is directly to the contrary, the contract being held to be fully performed.

(w) *Crane v. Gough*, 4 Md. 322, reversing 3 Md. Ch. Dec., 119.

(x) *Loeffes v. Lewen*, Prec. Ch. 371.

(y) (*Re*) *Garratt's Trust*, 18 W. R. 684; see *Williams v. Williams*, 18 L. T. N. S. 785; in both these cases there was also a part payment.

(z) *Child v. Pearl*, 43 Vt. 224.

agreement before marriage, by which the intended husband and wife surrendered their mutual rights in the property of the other, and under which the husband gave his wife the control of her own property, and paid a certain sum yearly, is a bar to an action by the wife, when a widow, for her legal right to \$300; the contract, though by parol, is good, having been fully performed.(a) Where two persons about to marry agree to relinquish to the wife's mother, who was also her guardian, and in possession of the property, all the daughter's estate, it was held in Alabama that the contract requiring no further act, was fully performed, as against a creditor of the husband.(b) The following instruction was held to be correct law: "That a parol agreement made between husband and wife, in view of separation, and fully executed on the part of the husband, wholly for a consideration, which, in the light of all the circumstances of the parties at the time the contract is made, is fair, reasonable, and just, the contract will be upheld.(c)"

§ 182. Marriage itself is no part performance of a contract in consideration thereof.(c¹) In a case in the reign of Charles I., it was held that an oral contract, in consideration of marriage, that the wife should have the separate use of certain property of her own, was done away with by the very fact of marriage.(d) *Lassence v. Tierney* was a curious case, there a surviving husband, whose wife had only a life-interest in certain real and personal estate, and also property

Marriage itself not a part performance of a promise in consideration thereof.

(a) *Houghton v. Houghton*, 14 Ind. 505; see, *contra*, *Finch v. Finch*, 10 Ohio St. 505, *supra*.

(b) *Andrew v. Jones*, 10 Ala. 400; see *supra*, § 179.

(c) *Dutton v. Dutton*, 30 Ind. 454. For examples of voluntary performance of oral contracts in consideration of marriage, see *Goodell v. Blumer*, 41 Wis. 443; *Credle v. Carrawan*, 64 No. Car. 422; *Jeston v. Key*, L. R. 6 Ch. App. 612.

(c¹) *Taylor v. Beech*, 1 Ves. Sr. 297; 3 Rep. in Ch. (Fol.) 50.

Redding v. Wilkes, 3 Bro. C. C. 401; *Barter, ex parte*, Mont. Cas. in Bank. 135; *Lassence v. Tierney*, 1 Mac. & G. 551; *Warden v. Jones*, 2 De Gex & J. 76; *Crofton v. Ormsby*, 2 Sch. & Lef. 590; *Bradley v. Saddler*, 54 Ga. 682; but see *Durham v. Taylor*, 29 Ga. 176; *semble, contra, Flenner v. Flenner*, 29 Ind. 569; *Ogden v. Ogden*, 1 Bland, 287; *Brown v. Conger*, 8 Hun, 626; *Finch v. Finch*, 10 Ohio St. 505.

(d) *Suffolk (Earl of) v. Greenville*,

of her own absolutely, claimed under a devise from her; the power to will was given her by a deed, executed by the husband and wife, but not properly acknowledged by her. It was held that she had no power to will, although after marriage a bill had been brought by her against her husband, claiming specific enforcement of an oral antenuptial contract, and although the husband in his answer acknowledged the contract, and thereafter the deed above mentioned, which was in accordance with the oral trust, was executed.(e) A marriage entered into upon receipt of a memorandum containing certain promises is proof of the acceptance of and reliance upon the memorandum.(f) It has been suggested in one or two cases that marriage ought to be considered sufficient part performance.(g) But what is probably meant is, that when the marriage is had in reliance and trust upon the oral promise, the latter shall be sustained on the principle of fraud (see *supra*, § 181). In the case of *Andrew v. Jones*, 10 Ala. 400 (see § 175), the only real performance seems to have been the fact of marriage, for the contract was to relinquish certain property to a person who had possession, and the court said that no further act of performance was called for under the contract. In Scotland the marriage itself has the effect of validating an informal contract in consideration thereof.(h)

§ 183. Another phase of the doctrine of part or full performance of a contract, in consideration of marriage, is that of a post-nuptial settlement in fulfilment of an ante-nuptial promise, except as being violative of the rule which forbids voluntary conveyances in fraud of creditors as under the statutes of Elizabeth such post-nuptial settlements are entirely valid.(i)

Post-nuptial settlement in fulfilment of an ante-nuptial agreement.

(e) 1 Mac. & G., 570, citing and distinguishing *Hamersley v. De Biel* and *Dundas v. Dutens*.

(f) *Saunders v. Cramer*, 3 Dr. & W. 87; 5 Ir. Eq. 12; S. C., S. N., *Greene v. Cramer*, 2 C. & L. 54.

(g) *Coles v. Pilkington*, L. R., 19 Eq. 178 (*Malins, V. C.*), and by Story in *Eldredge v. Jenkins*, 3 Story, 286;

see *Jeston v. Key*, L. R., 6 Ch. App. 612; *Durham v. Taylor*, 29 Ga. 176.

(h) *Falconar v. M'Leod*, Sess. Cas., 8 S. 312; but not a forged contract; see *Kibbles v. Stevenson*, Sess. Cas., 9 S. 237.

(i) *Taylor v. Beech*, 1 Ves. Sr. 297; *Montacute v. Maxwell*, 1 P. Wms. 618; *Prec. in Ch.*, 526; 1 Eq. Ca. Ab. 19; *Luders v. Anstey*, 4 Ves. Jr. 501

This rule applies to the case of chattels,(j) and a purchaser with notice cannot claim the rights of a creditor;(k) an oral contract not to claim marital rights in the estate of each other entered into by two persons about to marry will be sustained in Kentucky as against themselves and volunteers claiming under them, but see *supra*, § 172.(l) It has been decided in California that a post-nuptial execution of an antenuptial contract cannot be assailed by creditors because the latter was oral.(m) A post-nuptial settlement if otherwise void as against creditors will not be saved by the fact that it was made in fulfilment of an oral antenuptial contract; the latter has no effect in removing the voluntary character of the settlement.(n) An uncle having verbally promised M'Askie, the plaintiff, the proposed husband of his niece, that he would make a suitable provision for her at his death, executed after the marriage a bond to M'Askie; the uncle afterwards assigned a certain policy of insurance to M'Cay, the defendant. After discussing the effect of a letter written before the marriage by the uncle to his niece, stating that he would not assign to her or her husband, but would do the same thing in another way, which letter was written in confidence and not communicated to the husband, the master of the rolls (Walsh) said that the antenuptial promises were too vague to make the subsequent bond other than voluntary, that they were not even representations, and that under *Jordan v. Money* it was doubtful whether as parol representations they would have any effect, and that the antenuptial contract being non-enforceable under the Statute of Frauds made the subsequent bond voluntary. It makes no difference that the agreement

Argenbright v. Campbell, 3 H. & Mun. 159, citing cases *Brooks v. Dent*, 1 Md. Ch., Dec. 526; *Davidson v. Graves*, Riley's Eq. Rep. 231, citing cases; *Albert v. Winn*, 5 Md. 74, citing authorities; *Saunders v. Fefrill*, 1 Ired. 97.

(j) *Koonce v. Bryan*, 1 Dev. & Bat. Eq. 233, and as between the parties the post-nuptial settlement will be corrected upon evidence of the oral antenuptial contract.

(k) *Argenbright v. Campbell*, 3 H. & Mun. 159.

(l) *Southerland v. Southerland*, 5 Bush, 593.

(m) *Hussey v. Castle*, 41 Cal. 242.

(n) *Lloyd v. Fulton*, 91 U. S. 483; *Wood v. Savage*, 2 Doug. (Mich.) 319, citing authorities; *Izard v. Izard*, Bailey Eq. Rep. 230; *Brooks v. Dent*, 1 Md. Ch. Dec. 526, citing cases; *L'Estrange v. Robinson*, 1 Hogan, 202.

in this case is between the husband and a third party, the same rule applies as would in the case of a promise between a proposed husband and wife, the assignment of the policy it was held would not be disturbed at the instance of a volunteer, and the plaintiff's bill was dismissed.(o) In a Canada case an oral antenuptial promise proved by the parties themselves is not valid to support a post-nuptial written settlement, but it may be received *semble* as corroborative of the claim that the latter settlement was not made in fraud of creditors.(p)

Where two persons about marrying go to a solicitor to have the settlement upon herself made of the wife's private fortune, and they are told that the settlement cannot be prepared for several days, and the intended husband tells the lady that a settlement will do just as well, and shortly afterwards they marry, and a post-nuptial settlement not reciting the antenuptial contract is executed soon after the marriage, it was held that the post-nuptial settlement was not good as against creditors. Lord Chancellor Cranworth said that the Statute of Frauds applied; that the husband's assurance to the lady was not proved to be fraudulent; that the parol antenuptial contract was not, on the ground of moral obligation, good as a basis for the post-nuptial settlement, so as to make the latter other than voluntary, otherwise a man could by a promise, which could not be enforced against him, use a post-nuptial settlement to defeat creditors whenever disposed.(q)

(o) *M'Askie v. M'Cay*, Ir. Rep., 2 Eq. 451; 16 W. R., 1188, doubting whether, under *Jordan v. Money*, expressions of future intention come within the rule of false representations which estop; *Warden v. Jones* was strongly relied on.

(p) *Boustead v. Shaw*, 27 Grant, 290.

(q) *Warden v. Jones*, 2 De G. & J. 76, citing *Spurgeon v. Collier*, distinguishing *Hamersley v. De Biel*, as a case where there were other considerations than that of marriage. The Lord Chancellor citing *Lassence v. Tierney*, and Sir Wm. Grant's remarks in *Randall v. Morgan*, questioned *Dundas v. Dutens*;

but distinguished the principal case for the reason that in it the settlement did not recite the antenuptial agreement. He thought that even if the settlement had contained such a recital, it still would have been void; see S. C. below, before the master of the rolls, 23 Beav. 494.

The master of the rolls distinguished *Jordan v. Money*, and *Neville v. Wilkinson*, as being cases of fraud; and *De Biel v. Thomson*, and *Surcome v. Pinninger*, on the ground that in these the contract was not between the husband and wife, but between the lady's father and the intended husband, and

The recital in the settlement will not be considered as a memorandum of the oral contract, so as to give the contract any effect as prior to the settlement itself.^(r) In a Tennessee case it was intimated that a recital in the deed might save the contract.^(s) Where a post-nuptial settlement was made in accordance with the settlor's expressed intention made before the marriage, and there was no proof of any contract between the settlor and the husband of the lady before the marriage, or that the settlor's previous intentions were communicated to the intended husband, it was held by Lord Keeper Henley that the settlement was purely voluntary, that under the circumstances it would not for want of reciprocity have been valid before the Statute of Frauds, and that since the Statute of Frauds it was dangerous to uphold a post-nuptial settlement by proof of a parol antenuptial one.^(t) The leading authority in America is Chancellor Kent's decision in *Reade v. Livingston*.^(u) A deed of settlement in favor of a wife, made many

was not in consideration of marriage, in so far at least that there could be, and was part performance other than the mere fact of marriage, there being expenditures made under the contract in both cases by the respective husbands; that *Dundas v. Dutens* is not consistent with *Randall v. Morgan* and *Lassence v. Tierney*; that the post-nuptial settlement could not be treated as a part performance of the antenuptial contract, but, if valid, a complete performance; the validity was, however, the very point in dispute: that the employment of a solicitor must show that the lady did not rely on her husband's representation of the validity of a post-nuptial settlement, but that in trusting she must be supposed to have trusted to his honor; and that the husband was not obliged to set up the Statute of Frauds, but could voluntarily perform, did not prejudice his creditors.

(r) *Battersbee v. Farrington*, 1 Swans.

113; see *Cooper v. Wormald*, 7 W. R. 402; *L'Estrange v. Robinson*, 1 Hogan, 202; *Davidson v. Graves*, Riley's Eq. Rep. 231, citing cases; *Smith v. Green*, 3 Humph. 121; *Albert v. Winn*, 5 Md. 74; *Reade v. Livingston*, 3 Johns. Ch. 481; *Borst v. Corey*, 16 Barb. 136 (the husband was insolvent when the alleged oral contract was made); *Satterthwaite v. Emley*, 3 Green Ch. N. J. 491 (saying that if properly proved, however, a post-nuptial settlement under an antenuptial contract was good).

(s) *Caines v. Marley*, 2 Yerg. 588; but see *Smith v. Green*, *supra*.

(t) *Spurgeon v. Collier*, 1 Eden, 61; see p. 62 n. (a), citing cases.

(u) 3 Johns. Ch., 481; citing *Jason v. Jervis*, 1 Vern. 284; *Ramsden v. Hylton*, 2 Ves. 304. The chancellor said that *Griffin v. Stanhope* (Cro. Jac. 454), and *Sir Ralph Bovy's Case*, and *Lavender v. Blackstone* (2 Lev. 146), holding that a parol antenuptial contract was a sufficient foundation for

years after marriage, voluntary on its face, and reciting no antenuptial agreement on the part of the settlor, the husband, supported only by proof of a parol agreement, differing from the terms of the settlement, and inconsistent in some respects with the sworn answer of the settlor in the particular case, was held invalid as against creditors. The chancellor said that a post-nuptial settlement, made in pursuance of a *written* antenuptial contract, was good. In North Carolina, where by statute marriage settlements must be registered within a certain time or be void, a settlement cannot be corrected even in equity on oral evidence of the antenuptial contract, at least as to creditors; *semble secus* as to the husband and volunteers under him.(v)

§ 184. The conclusions which have been set forth were not settled without conflict of decision; as late as 12 Vesey, Sir William Grant, though evidently inclined to the modern view, acknowledges the difficulty of overcoming previous authority: after saying that to support a post-nuptial writing by the fact of an antenuptial oral contract would be to ignore the difference between the fourth and seventh sections of the Statute of Frauds, the seventh section requiring a writing only to evidence not to create a trust, he adds: "There are dicta that a settlement after marriage, reciting a parol agreement before marriage is not fraudulent against creditors; provided the parol agree-

The history of the law as to such settlements.

such post-nuptial settlement, were before the Statute of Frauds.

That *Montacute v. Maxwell* (1 Str. 236), 1 P. Wms. 618, decided that a parol promise to make a settlement in consideration of marriage was invalid, but that a written admission after marriage would have been sufficiently supported by such previous parol promise, the chancellor remarked, that *Dundas v. Dutens*, as reported in 1 Vesey, Jr. 196, seemed to discountenance a post-nuptial settlement supported as to creditors, by a parol antenuptial promise, but that in the same case, as reported in 2 Cox Ch., 235, the Lord Chancellor

Thurlow apparently regarded such a settlement as good. Kent argued that, as reported, *Dundas v. Dutens* was of very little use as an authority. In *Randall v. Morgan* Sir Wm. Grant, referring to *Dundas v. Dutens*, thought post-nuptial memoranda, would not support an antenuptial parol contract. Kent refers to *Prec. Chan.*, p. 101, as *contra* to *Randall v. Morgan*, but looks upon it as a loose note; *Atherley on Marr. Sett.* being cited, and *Roberts on Frauds*, p. 243, criticized.

(v) *Saunders v. Ferrill*, 1 Ired. 97; Act 1785, c. 238; Rev. Stat., c. 37, § 29.

ment had actual existence. But I do not know that the point has been directly decided. It was discussed in *Dundas v. Dutens*, but Lord Thurlow, though inclined that it should stand good, said it was a mere matter of curiosity, if the first point was against the plaintiff, as it was. A case in *Levinz* is there referred to, a dictum, not a decision, that the settlement was void; for, although a parol promise before marriage was proved, and a settlement made after the marriage, yet it was not made with such a correspondence to the parol promise, as to appear to have been made in the execution of it.”(w) The two decisions which conflict most with what is now admitted to be law are *Dundas v. Dutens*, and *Shaw v. Jakeman*. In the former case, as reported in 2 Cox, Lord Chancellor Thurlow said that he could not conceive that a settlement made after marriage, in pursuance of an agreement before marriage, though only in parol, could ever be considered a fraudulent settlement; that the cases, though they had gone a great way in treating settlements after marriage as fraudulent, have never gone to such length as that, and he was, therefore, clearly of the opinion that the settlement was in itself valid.(x) To make another quotation, Lord Thurlow, as reported in 1 Ves. Jr., said,(y) speaking of a post-nuptial settlement, reciting that it was in pursuance of a parol antenuptial agreement, “if the husband made an agreement that he would settle, and then in fraud of that agreement got married, would not he be bound by it? I thought there was a case in point for that. What the settlement might be if made upon himself after marriage is another question. But in Eq. Ca. Ab., where there was an agreement before marriage without any execution, and then refused to execute,

(w) *Randall v. Morgan*, 12 Ves. Jr. 71. It is said in the notes to *Dundas v. Dutens*, that Sir William Grant, in speaking of the latter case, did not know the report of it as given in 2 Cox. In *Barkworth v. Young*, 4 Drew, 9, 26 L. J. Ch. 153, it was said that the memorandum was sufficient, though made after marriage, Sir William Grant’s doubt in *Randall v. Morgan*

being done away with by *De Beil v. Thomson* and *Hodgson v. Hutchinson*. In *Barkworth v. Young* the contract was between a son-in-law and his father-in-law, and the memorandum was an affidavit stating the antenuptial promise made by the father-in-law.

(x) *Dundas v. Dutens*, 2 Cox, 240.

(y) *Id.* 1 Ves. Jr., 196.

relief was given. If in this case there was an agreement before marriage, and afterwards he drew her in to be married, and then refused to perform it, it appears to me to be that kind of fraud against which this court will relieve. If there is a parol agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner, but is there any case where in the settlement the parties recite an agreement before in which it has been considered as within the Statute?"(z) *Shaw v. Jakeman* was as follows: There was an antenuptial written article of settlement naming a sum agreed to be settled by the husband after marriage; there was a formal deed reciting the previous promise, and correcting the sum named therein, which was £340, in the public funds, and which should have been £450, which was then actually worth £340; in an action at law the deed was held to be good for £340, though in equity *semble* it would have been good for the £450. Lord Ellenborough said that the post-nuptial settlement, in pursuance of an antenuptial contract, was, notwithstanding the Statute of Frauds, valid under *Dundas v. Dutens* and *Tyrrell v. Hope*, 2 Atkins, 558, and would not in equity be affected by the alterations in the articles or the deed as against the married woman; for her, in spite of the husband's bankruptcy, to defend for the difference between the £340 as in the original agreement, and £450 as in the altered agreement, on the ground of mistake, was for equity solely, and therefore there was a verdict for plaintiff, a creditor of the husband, for

(z) Mr. Sumner, in his notes to *Dundas v. Dutens*, in 1 Ves., answers to Lord Thurlow's question, that if a husband was guilty of fraud beyond mere breach of honor, he is bound, citing *Suffolk (Earl of) v. Greenvill*. To the second question the annotator answers that as against himself or volunteers under him, the husband is bound, citing cases; but not as against creditors, citing *Spurgen v. Collier* and *Battersbee v. Farrington*. The vague statement is added, where there is aliunde satisfactory evidence of the

antenuptial contract, the post-nuptial one may probably be sustained. Mr. Sumner, citing *Shaw v. Jakeman*, 4 East, 206, and other cases, says that Lord Thurlow was undoubtedly in favor of supporting settlements like that in *Dundas v. Dutens*, and closes with the remark, if a post-nuptial settlement recites to have been in consideration of a marriage portion, it is immaterial whether there was any antenuptial contract or not; cases being cited. See *Cooper v. Wormald*, 7 W. R. 402, *infra*.

the difference.(a) In a New Jersey case the law is stated with qualifications; the court said that a post-nuptial settlement, in pursuance of an antenuptial agreement is apparently good if the latter is properly proved; such agreement is for a valuable consideration, and not voluntary; but where the only proof is a recital in the deed of settlement, and the declarations of the husband, made during coverture and shortly before the settlement, it was held that the latter, though good against him, was not good as against debts which were in existence at the date of the deed.(b) In a Virginia case, it was said that a post-nuptial settlement, in consideration of an antenuptial parol agreement, was within the Statute of Frauds when the agreement related to land, and would be on other grounds closely scrutinized to see if there was any fraud and any discrepancy between the two contracts, or any doubt of the latter contract having been made in pursuance of the former.(c) In an early Kentucky case the question was asked whether an antenuptial contract will in any case support as against creditors a post-nuptial settlement.(d) Before the Statute of Frauds post-nuptial settlements could be supported by an oral antenuptial agreement, that is to say, the Statutes of Elizabeth could not, without the aid of that of Charles II., invalidate such transactions. In a case in Ventris, it was said that "this settlement being in pursuance of articles made precedent to marriage, had not the least color of fraud, etc., and if there had been but a verbal agreement for such a settlement it would have served the turn" (dictum). A verbal agreement before marriage would support as against creditors a post-nuptial settlement.(e) Where, before marriage, money under an oral contract of settlement is delivered to trustees it is good, though they do not execute the declaration of trust till after the marriage.(f) A reference to the

(a) 4 East, 201; 1 Smith, 14 (see note as to *Dundas v. Dutens*).

(b) *Satterthwaite v. Emely*, 3 Green, Ch. N. J. 491, citing authorities.

(c) *Blow v. Maynard*; *Lawrence v. Blow*, 2 Leigh, 50, citing *Lavender v. Blackstone*; *Reade v. Livingstone*.

(d) *Jones v. Henry*, 3 Litt. 433.

(e) *Sir Ralph Bovey's Case*, 1 Ventr. 194.

(f) *Cooper v. Wormald*, 27 Beav. 266; 7 W. R., 402; distinguishing *Hamersley v. De Biel*, and the class of cases where a post-nuptial settlement reciting an antenuptial agreement is sought to be upheld on such good ante-

chapter on trusts will show the difference between a trust and a contract in this relation. Sir Wm. Grant said, in *Randall v. Morgan*, that a distinction should be made between a trust validly created by word of mouth, but requiring for its evidence a subsequent writing, and an ordinary invalid oral contract, which would support as against creditors a deed made in fulfilment of it. In an equity case in New York, it was held that money belonging to a wife, which the husband never reduced to possession, and which, by his consent and under an oral antenuptial agreement, she retained after marriage, could not be reached by his creditors any more than by himself.^(g) In a Mississippi case, a post-nuptial settlement was sustained, the settlor not then being indebted; if there had been a bill for specific performance, the Statute of Frauds could have been set up, but the conveyance having been made for a valuable consideration and from honest motives, it ought to be sustained.^(h) On the subject of post-nuptial settlements, made in accordance with an antenuptial promise, see the references in the note.⁽ⁱ⁾

§ 185. The following are some examples of memoranda of marriage contracts regarded as sufficient to satisfy the Statute of Frauds; thus a letter addressed to a third person is sufficient.^(j) A letter under the circumstances of the particular case showing the consent on the part of the lady's mother to be conditional upon the promised settlement was held to be sufficient.^(k) So an affidavit signed stating that the affiant said on the marriage of his daughter that there would be no money for the daughter's husband at the time of the marriage, but that on the affiant's death the daughter should have her share as child.^(l) Where an

Memo-
randa of
contract.

nuptial agreement, see "Trust;" see *Dundas v. Dutens*, *supra*, and *Randall v. Morgan*, *supra*.

^(g) *Smith v. Kane*, 2 Paige, Ch. 303.

^(h) *Butterfield v. Stanton*, 44 Miss. 33; see also *Dygart v. Remerschnider*, 32 N. Y. 629.

⁽ⁱ⁾ *May on Volunt. Alien.*, p. 350 *et seq.*, p. 366; *Story's Eq. Jur.*, § 374 (p. 364) and *u.*; *IX. Law Rev.*, first

ser. p. 87; *Williams on Pers. Prop.*, p. 272, n.; *Hunt on Fraud. Convey.*, p. 31; *Will. on Exec.* (6th Am. ed.) [p. 756].

^(j) *Ogden v. Ogden*, 1 Bland, 287.

^(k) *Alt v. Alt*, 4 Giff. 84; see *Crofton v. Ormsby*, 2 Sch. & Lef. 590.

^(l) *Scott v. Avery* (Dom. Proc.), 20 Monthly Law Reporter; *Fell on Guar.*, p. 61, n; see as to sufficient memo-

antenuptial contract by which a husband gives up his marital rights in her property, and which enabled her to devise, etc., her property clear of such rights on his part, was evidenced by a will which was mistakenly drawn instead of a deed, and the will was revoked by the subsequent marriage of the parties, the mistake will be corrected in equity.(*m*)

§ 186. Mutual promises to marry are not within the Statute of Frauds.(*n*) In a case in Lord Raymond it was ruled at Norfolk summer assizes then last past by Ward, L. C. B., that this promise, *i. e.*, to marry, had no need to be in writing by the Statute of Frauds, and Mr. Northey said at the bar that the statute intended only agreements to pay marriage portions, and that it had often been ruled so by Holt, C. J. *Quod Holt, non negavit.*(*o*) The rule had formerly been otherwise.(*p*) It has been held in New Hampshire that a promise to marry in five years is within the "year" clause of the Statute of Frauds, and the fact that such contracts were not suable at law when that act was passed does not prevent it applying to them.(*q*) As to forms of marriage settlements, see Peachey on Marriage Settlements, p. 65.

random, *Chicester v. Vass*, 1 Munf. 99.

(*m*) *Lant's Appeal*, 95 Pa. St. 279.

(*n*) *Anon.*, Skin. 142, pl. 14, per Jeffries, L. C. J.; *Atkins v. Farr*, 2 Cas. Eq. Ab. 248; *Clark v. Pendleton*, 20 Conn. 495; *Withers v. Richardson*, 5 Mon. 94; *Blackburn v. Mann*, 85 Ill. 222; *Short v. Stotts*, 58 Ind. 36; *Morgan v. Yarborough*, 5 La. Ann. 316; *Crane v. Gough*, 4 Md. 322; *Ogden v. Ogden*, 1

Bland, 287; *George v. Barton*, 7 Watts, 532.

(*o*) *Harrison v. Cage*, 1 Ld. Raym. 387.

(*p*) *Cocke or Cork v. Baker*, 1 Str. 34, cited in Bull. N. P., 280; citing *Anon. Salk.*, 280; see, also, *Philpot v. Walcot*, Skin. 24, 3 Lev. 65.

(*q*) *Derby v. Phelps*, 2 N. H. 516; see Sch. on H. & W., § 44; see *supra*, § 172.

CHAPTER VIII.

YEAR.

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| <p>§ 187. <i>Extra annum</i> contracts within the Statute of Frauds ; generally.</p> <p>§ 188. How far the impossibility of performance <i>infra annum</i> is an actual one, or only the intention of the parties that the performance should extend over a longer period.</p> <p>§ 189. The option of one party to bring the contract to complete performance within the year.</p> <p>§ 190. Entire and continuing contracts generally.</p> <p>§ 191. Partnership and service contracts.</p> <p>§ 192. Contracts determinable by death or by the action of either party.</p> <p>§ 193. Contracts for a year beginning at a future date.</p> <p>§ 194. General examples of contracts within and of those not within the year clause.</p> <p>§ 195. The year clause in relation to other clauses of Statute of Frauds ; generally.</p> <p>§ 196. Leases.</p> <p>§ 197. Exceptions to the year rule.
The contingency rule.</p> <p>§ 198. Contract left incomplete by a contingency ; one capable of performance within the year but not so performed, and one whose performance within the year is improbable.</p> <p>§ 199. When no time is fixed.</p> <p>§ 200. Contract terminable at any time by either party.</p> | <p>§ 201. Contract for a fixed period terminable by either party is not within the Statute.</p> <p>§ 202. <i>Contra</i>.</p> <p>§ 203. The effect of death as a contingency to terminate a contract for fixed period.</p> <p>§ 204. Death as a contingency affecting a contract whether for a fixed period or not.</p> <p>§ 205. Defence.</p> <p>§ 206. One side rule.</p> <p>§ 207. New York cases under the one side rule.</p> <p>§ 208. One side rule modified, doubted, or denied.</p> <p>§ 209. Distinction between actual and only possible execution of one side of the contract.</p> <p>§ 210. Examples under the entire performance of one side rule.</p> <p>§ 211. Compensation on a <i>quantum meruit</i> for entire performance of one side.</p> <p>§ 212. Land contracts entirely performed on one side.</p> <p>§ 213. The effect of full performance of one side when the contract is within the year clause, and also within the land or leases clause.</p> <p>§ 214. Year clause and chattels clause.</p> <p>§ 215. <i>Contra</i> to the last rule.</p> <p>§ 216. Part performance generally.</p> <p>§ 217. Complete execution of both sides.</p> |
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§ 187. CONTRACTS incapable of being performed within a year must by the terms of the Statute of Frauds be proved by

a writing.(a) In an early Connecticut case, briefly reported, it was claimed by counsel that the fact of the lapse of three years between the promise and the suit thereon was a reason for applying the Statute of Frauds, but the court held the contract to be an executed one, and therefore not within the Statute.(b) In Scotland a contract for services for three years *semble* requires a formal instrument, witnessed, etc., and *semble* is not good even for a year.(c) Where there is no averment or evidence that the agreement was not to be performed within a year, the Statute does not apply.(d) The impossibility of performance within the year must appear in the contract itself,(e) and in Wisconsin it has been held if the contract does not by its terms show impossibility of performance *infra annum*, that oral proof of such impossibility will not cause the Statute to apply.(f)

§ 188. An important and much disputed distinction is met with at an early stage of this subject, and that is the question whether the impossibility of performance means the actual impossibility or only the intention of the parties that the contract shall not be performed within the year. Of course, if the performance within the year is actually impossible, the parties cannot be supposed to have meant to so perform it; but it may well be that a contract readily performable within the year may not have been intended to be completed till after a longer lapse of time. The weight of authority is decidedly in favor of treating either of these contingencies as being sufficient to bring the case within the Statute. Thus it has been said that the Statute of Frauds plainly means an agree-

How far the impossibility of performance *infra annum* is an actual one, or only the intention of the parties that the performance should extend over a longer period.

(a) See *Boydell v. Drummond*, 11 East, 142, the leading case on the subject for a consideration of the reason and policy of this clause of the statute.

(b) *Chittington v. Fowler*, 2 Root, 387.

(c) *Paterson v. Edington*, Sess. Cas. 8 S. 931; 5 Fac. (Oct.) Dec. 757.

(d) *Rabsuhl v. Lack*, 35 Mo. 322; see *Fenton v. Emblers*, 1 Wm. Bl. 352; 3 Burr. 1278.

(e) *Russell v. Slade*, 12 Conn. 460; see *Railroad Co. v. Staub*, 7 Lea, 399.

(f) *Rogers v. Brightman*, 10 Wis. 65.

ment not to be performed within a year, and expressly and specifically so agreed.(g) The mere possibility that the contract may be performed within the year is not sufficient to make an exception to the Statute, if the parties did not intend to perform within that time.(h) On the other hand, a promise to marry in four years is not within the Statute of Frauds, if it did not appear that the parties understood that the promise was not to be performed *infra annum*.(i) An impossibility of performance means not "a natural or physical impossibility, but an impossibility by the terms of the contract itself, or by the understanding and intention of the parties."(j) Thus, an engagement to provide a widow with the supplies she needed till her youngest child came of age, and herself until her death, is within the year clause of the Statute of Frauds. That all might die within a year will not affect the case. Where the manifest intent of the parties is that the contract shall not be executed within the year, the mere fact that it is possible that the thing agreed to be done may be done within the year will not prevent the Statute from applying, physical possibility alone is not what is meant. "It is not enough that the thing stipulated may be accomplished in less time, but such an accomplishment must be an execution of the contract according to the understanding of the parties."(k) The Statute of Frauds, it was said in another case, applies to those contracts "in which, by the express appointment of the parties, the thing is not to be performed within a year;"(l) or, again, it was said that the performance beyond the year must arise from the stipulation of the contract or the understanding of the parties;(m) or, again, that the Statute of Frauds applies when the understanding of the parties, as evidenced by the contract, is that the performance

(g) *Fenton v. Emblers*, 1 W. Bl. 352; 428; *Railroad Co. v. Straub*, 7 Lea, 3 Burr. 1278; see *Knowlman v. Bluett* 399.

(Blackburn, J., in argument), L. R., 9 Ex. 307; 43 L. J. Exch. 151; 10 Moak, n. 467; see *Cowles v. Warner*, 22 Minn. 456; *Herrin v. Butters*, 20 Me. 121; *Foote v. Emerson*, 10 Vt. 342.

(h) *Hinckley v. Southgate*, 11 Vt.

(i) *Lawrence v. Cooke*, 56 Me. 187.

(j) *Jilson v. Gilbert*, 26 Wis. 637.

(k) *Deaton v. Tenn. R. R.*, 12 Heisk. 653.

(l) *Leinau v. Smart*, 11 Humph. 310.

(m) *Peters v. Westborough*, 19 Pick. 365.

of the latter is to extend beyond a year.⁽ⁿ⁾ It need not expressly appear that the parties intended a performance *extra annum*, it is sufficient that this is implied.^(o) In two cases it has been said that the expectation of the parties, that the contract would require more than a year for its performance, is of no consequence, even though performance within the year is not probable, if no time is fixed, and performance *infra annum* is possible.^(p) Of the two cases just cited, the former showed a contract completely performable in the event of certain deaths, which might also occur presently; and the other, a contract which called for performance immediately upon the sale of a large number of pieces of real estate, which, however unlikely, might indeed happen within a year. The great case of *Boydell v. Drummond*^(q) gave the best test ever suggested in this connection, when it decided that if by a miraculous effort the plaintiff should within a year do his part of the contract, which was to furnish the defendant with a large number of engravings of scenes from Shakespeare, the Statute of Frauds nevertheless applied, because the defendant, who was to pay by instalments, would not be required to pay at such unreasonably short intervals as a completion of the work within a year would involve. Accepting this rule as a guide, the question in every instance will be not alone, what is the shortest period of possible performance physically, nor what is the shortest period which the parties supposed would be required,^(r) but whether the contract can actually be performed within a year, and, if so, whether under the terms of the contract either party performing within that time can justly require the other party to do his part, the latter performance also being as a fact possible. Thus where the promise of the defendant was to answer for the possible loss to be incurred on certain bonds which were not to be sold until sixteen months, it is clear that he cannot be called upon to

(n) *Wilson v. Ray*, 13 Ind. 6.

Blair Town Lot Co. v. Walker, 39 Iowa,

(o) *Hearne v. Chadbourne*, 65 Me. 406.

306.

(q) 11 East, 142; 2 Camp., 157.

(p) *Ellicott v. Peterson*, 4 Md. 487;

(r) *Gault v. Brown*, 48 N. H. 185;

Miles v. Bough, 3 Q. B. 845.

perform his part at any time short of the sixteen months.(s) A promise to marry is within the Statute of Frauds, though no precise time of performance is agreed upon, if the jury specially find that the time agreed upon, though indefinite, was remote and beyond a year.(t) When the parties agree upon certain payments which are to be yearly, and a continuous arrangement is contemplated the Statute applies.(u)

§ 189. A class of cases which are not so clear in their character, are those which may be said to be the converse of *Boydell v. Drummond*, viz., where the defendant might under the contract be called upon to perform, and it is the plaintiff who is not to be hurried. In *Boydell v. Drummond* it would have been unreasonable to have required either party to perform *infra annum*. But the case is certainly different where the defendant holds himself ready to perform at any time, and it is only the plaintiff who can take more than a year if he chooses. Thus in a Kentucky case, a negro purchasing the freedom of his wife agreed to pay for her \$400 in instalments of at least \$4 a month, and it was stipulated that while he need not pay more than \$8 a month, he could, if he pleased, pay any amount not less than \$4. Here it would seem that performance within the year was reasonably possible, but the court held the Statute of Frauds to apply, considering that a performance *infra annum* was not contemplated by the parties.(v) In a case in 6 Otto it was held that because the plaintiff was not obliged to finish his work till after the year was up, *non constat* but that he might have finished it within the year and required the other party to perform.(w) In a Texas

The option of one party to bring the contract to complete performance within the year.

(s) *Wilson v. Ray*, 13 Ind. 6, citing cases.

(t) *Nichols v. Weaver*, 7 Kan. 373; see, also, *Wheeler v. Cowan*, 25 Me. 285. In *Nichols v. Weaver*, which was a case of a promise to marry, the court said that apart from the special finding of the jury, a general promise to marry meant a promise to marry within a reasonable time, and that a year or less might be a reasonable time. On this latter reasoning, Black-

burn v. Mann, 85 Ill. 222, decided that the Statute of Frauds did not apply to a general promise to marry.

(u) *Roberts v. Tucker*, 3 Exch. 632; *Smith v. Bowler*, 2 Disn. 156; 1 id. 520; *McElroy v. Ludlum*, 32 N. J. Eq. 828; 2 N. J. L. J., 177.

(v) *Saunders v. Kastenbine*, 6 B. Mon. 17.

(w) *Walker v. Johnson*, 96 U. S. S. C. 427; see, also, *Plimpton v. Curtis*, 15 Wend. 336.

decision much the same view was taken; the court said: “By the contract the appellant agreed if there was a failure to complete the contract, or for any reason it was abandoned, he would pay for the improvements made upon the land. There is nothing from which it can be inferred that the failure to complete the contract (by reducing it to writing, for instance, as was stipulated, should be done), or its abandonment might not occur within a year from the time it was consummated. The purchaser, it is true, was entitled by the agreement to a credit of five years for the payment of the purchase-money, if the contract had been reduced to writing. But the appellant might have sold to another, or the contract might have been abandoned by the purchaser at any time, and upon this alone depended the appellant’s liability for the improvement, citing cases.(x) Where the plaintiff was for two years to sell for the defendants, it was held in a Federal case that as the evidence showed that this proviso was made for the plaintiff’s benefit, and was at his option, the main gist of the contract consisting of the plaintiff’s promise to introduce the defendant’s goods to his customers, and this having been performed at once, the Statute of Frauds did not apply.(y) In an Irish case, which belongs to the category of *Boydell v. Drummond*, is illustrated the rule of which *Saunders v. Kastenbine* furnishes the converse; the agreement was between a landlord and his bailiff to whom he owed arrears of salary, that the latter should become tenant to the former, and that the arrears should be credited to the rent account, and that nothing should be claimed on this till the arrears were discharged; it was held that the Statute of Frauds applied, because it would take more than one year’s rent to pay the salary. Here obviously the landlord could not be compelled to pay the arrears, except in the way of yearly credits against the rent, and the tenant could not be compelled to pay his rent till it accrued due, so that it was not possible for either party to presently perform, and then hold the other, without a viola-

(x) *Thouvenin v. Lea*, 26 Tex. 612.(y) *Norton v. American Ring Co.*, 1 Fed. Rep. 686, C. C. S. D. N. Y.

tion of the contract.(z) Where the facts indicate that a performance *infra annum* is physically impossible, it need hardly be said that an intention to perform within the year will not be imputed to the parties.(a)

§ 190. Entire contracts extending over a year are within the Statute of Frauds.(b) Thus, a promise to make four annual deposits in a saving fund, though two deposits had been made;(c) or to sell and deliver the crops raised in successive years.(d) But a contract for an unlimited number of railroad ties, to be delivered in a time not fixed, is not within the Statute.(e)

Entire and continuing contracts; generally.

§ 191. A partnership for more than a year is within the Statute of Frauds;(f) though, as will be seen in the note, there is conflict of authority on this point; and in New York the rule is otherwise.(g) The commonest case of continuing contracts is that of service; and where the period agreed upon is longer than a year, the Statute applies.(h) Such contracts are entire, and suit will

Partnership and service contracts.

(z) Tierney v. Marshall, 7 Ir. C. L. 314; 6 Ir. Jur., N. S. 78.

(a) Swift v. Swift, 46 Cal. 269; Jones v. McMichael, 12 Rich. (So. Car.) Law, 181; Davis v. Appleton, 25 U. C. C. P. 381.

(b) Nones v. Homer, 2 Hilt (N. Y.), 116; Johnson v. Trinity Church, 11 Allen, 123; Chase v. Lowell, 7 Gray, 34; Cowles v. Warner, 22 Minn. 449. See for cases of continuing contracts held not to be within the Statute of Frauds, § 203 *et seq.*

(c) Parks v. Francis, 50 Vt. 628.

(d) Atwood v. Fox, 30 Mo. 499; Holloway v. Hampton, 4 B. Mon. 416.

(e) White v. Hanchett, 21 Wis. 415.

(f) Tomkins v. Randell, 19 W. R. 416; Williams v. Jones, 5 B. & C. 108 (a year's partnership beginning at a future date); Burdon v. Barkus, 4 De G. F. & J. 47; Wilson v. Ray, 13 Ind. 6; see Lindl. Part. (Ewell's ed.), p. *87 and notes; see, *contra*, Baxter v.

West, 1 Dr. & Sm. 173, in which Kindersley, V. C., held an unsigned memorandum for a seven years' partnership to be binding; and see Pickin v. Hawkes, Sess. Cases, 5 R. 677; in M'Kay v. Rutherford, 13 Jur. 21 (Priv. Coun.) it was said that a contract to let one into a partnership could be performed at once.

(g) Bank of Schuylerville v. Vanderwerker, 74 N. Y. 234; Smith v. Tarlton, 2 Barb. Ch. 337.

(h) Drummond v. Burrell, 13 Wend. 308; Nones v. Homer, 2 Hilt (N. Y.), 116; Jones v. Hay, 52 Barb. 521; Briggs v. Smith, 4 Daly, 113; Harper v. Davies, 45 U. C. Q. B. 442; Bernier v. Cabot Man. Co., 71 Me. 508; Tuttle v. Swett, 31 Me. 556; Pitcher v. Wilson, 5 Mo. 47; Ray v. Young, 13 Tex. 552; Tague v. Hayward, 25 Ind. 427; King v. Welcome, 5 Gray, 42; see Wood on Master and Ser., Index "Frauds."

not lie on the agreement for part service,⁽ⁱ⁾ even though the pay is different each year.^(j) Where there is any doubt as to the contract for each year being severable and independent, the question is for the jury, but if there is no evidence but of one entire contract, it is error to submit such a point to them.^(k) Where a contract for an indefinite time, stipulated for a yearly return, and the contract was terminable at any time at the option of the parties, a recovery was allowed for the contract price up to the time when this option was exercised, but there was no recovery for anything thereafter.^(l)

§ 192. The question how far the possibility of the death of one of the parties putting an end to the contract within a year, is such contingency as will take the case out of the Statute of Frauds, will be considered hereafter. On the one side of the controversy, it is claimed that the transaction may by death be presently completed, and therefore not within the Statute; on the other, it is argued that an entire contract covering a fixed period of time longer than a year can in no event be completed within the year, and that in the event of the death of one of the parties the contract is not performed, but defeated. The following cases with some of those already given, would appear to support this last view. Thus a promise by one aged sixteen to serve till majority, has been held within the Statute.^(m) As will be seen hereafter, a contract, though for a fixed period greater than a year, has been held by many authorities not to be within the Statute of Frauds if determinable by either party at any time. Thus where the defendant entered the plaintiff's service for a year, beginning at a future date and from year to year after the expiration of the first, subject to three months' notice, the defendant after serving several years was liable to the plaintiff for having left without

(i) *Emery v. Smith*, 46 N. H. 151; *Hill v. Hooper*, 1 Gray, 133; as to the entirety of such contracts, see *Cent. L. Jour.*, March 16, 1883.

(j) *Girard v. Richmond*, 2 M. G. & S. 835; *Currie v. McLean*, 2 Macph. (Scotch) 1076.

(k) *Oddy v. James*, 48 N. Y. 685.

(l) *Sherman v. Champlain Co.*, 31 Vt. 182.

(m) *Mack v. Bragg*, 30 Vt. 572; see *Shute v. Dorr*, 5 Wend. 204; *Jones v. Hay*, 52 Barb. 507; *Hill v. Hooper*, 1 Gray, 133.

notice, and the Statute of Frauds did not apply, because with each year there was a new contract,⁽ⁿ⁾ and the employer was in the converse case equally liable.^(o) Where, however, the contract is determined before the expiration of the first year the rule is different, and the Statute of Frauds applies, because it cannot be pretended that, the first year having expired before the breach occurred, as in *Collis v. Botthamley*, the contract is then a new one from year to year.^(p)

§ 193. A contract for a year, beginning at a future date, is within the Statute.^(q) Thus, a contract to farm for a year, beginning a year from date.^(r) A contract to serve for a year, the service to begin five days from date, is as much within the Statute as if the five days were five years.^(s) The Statute of Frauds applies when the plaintiff working for the defendant by the week, it was agreed that he should work for a year at a higher rate per week, and it appeared that the parties treated the new contract as beginning not at once, as the law might presume, but from the beginning of the next week.^(t) So when a con-

Contract for a year, beginning at a future date.

(n) *Collis v. Botthamley*, 7 W. R. 87 (Ex. Ch.).

(o) *Smith v. Conlin*, 19 Hun, 235.

(p) *Dobson v. Collis*, 25 L. J. Exch. 267, distinguishing *Beeston v. Collyer* as a case of fresh contract every year.

(q) *Bracegirdle v. Heald*, 1 Barn. & Ad. 722; *Williams v. Jones*, 5 Barn. & Cr. 108; *Cawthorne v. Cordrey*, 32 L. J. C. P. 152; *Banks v. Crossland*, L. R. 10 Q. B. 97; 44 L. J. (Mag. Cas.) 8; 11 Moak, 172 (n.) 44; *Snelling v. Huntingfield*, 1 C. M. & R. 20; 4 Tyrwhitt, 606; *Evans v. Roe*, L. R. 7 C. P. 142; *Dickson v. Jaques*, 31 U. C. Q. B. 142; *Harper v. Davies*, 45 U. C. Q. B. 445; *Reid v. Harding*, 2 Hann. (N. B.) 138; *Wier v. Letson*, 3 Russ. & Ch. 301; *Scoggin v. Blackwell*, 36 Ala. 351; *Burnett v. Blackmar*, 43 Ga. 576; *Comstock v. Ward*, 22 Ill. 248; *Arne v. Chadbourne*, 65 Me. 306;

Cowles v. Warner, 22 Minn. 449; *Sharp v. Rhiehl*, 55 Mo. 99; *Nones v. Homer*, 2 Hilt (N. Y.) 116; *Spencer v. Halstead*, 1 Denio, 606; S. C. above, *How. App. Cas.* 319; *Wilson v. Martin*, 1 Denio, 605; *Little v. Wilson*, 4 E. D. Sm. 422; *Turnow v. Hochstadter*, 7 Hun, 80; *Oddy v. James*, 48 N. Y. 685; *Vaughn v. De Wandler*, 63 How. Pr. 381; *Smith v. Bowler*, 2 Disn. 156; 1 id. 520.

(r) *Comstock v. Ward*, 22 Ill. 248; see *Nones v. Homer*, 2 Hilt. 116; see *Snelling v. (Lord) Huntingfield*, 1 C. M. & R. 20; 4 Tyr., 606; *Atwood v. Norton*, 31 Ga. 507. So a contract made on Saturday to begin the following Monday, *Britain v. Rossiter*, 11 Q. B. D. 123, Ct. App.

(s) *Kleman v. Collins*, 9 Bush, 460.

(t) *Hearne v. Chadbourne*, 65 Me. 306.

tract is made on December 31, 1880, for a year's service ending December 31, 1881, it is for a full year, and the Statute applies; but *quære*.(u) And in Massachusetts it was held that a contract of insurance for a year from and including the day on which the agreement was made, is not within the Statute. Hoar, J., saying, "when time is spoken of, any act is within the time named that does not extend beyond it.(v) So a contract made December 21, 1870, to begin December 22, 1870, and to end December 22, 1871;(w) a year under the Alabama code meaning a calendar year, and the day of the contract being excluded presumptively from the period of service. In a Maryland case, on March 8th, the defendant said to the plaintiff: "If I buy this mill, . . . I will employ you to take charge of it for a year, and will pay \$1000 a year;" the evidence indicated that on that same day the mill was bought. It was held that this might have been performed within a year, and that the Statute of Frauds did not apply; the contingency of buying the mill had occurred at once, and then the contract was no more than a year long; the court thought the arrangement an inchoate one on March 8th, and therefore, on that ground not to be dated from that day. Possession within the year was enough, though the parties may have intended its operation should extend through a greater time.(x) On the other hand, in Connecticut it has been held that an agreement to work for a year may begin at once, and is therefore not within the Statute.(y) A contract, however, made in December of one year for goods to be delivered in or before the end of the next, will not, without more, be assumed to be within the Statute of Frauds.(z) Where the service for a year, and then by the year, was to begin at a future date, the Statute was held, in a case already cited, not to apply, if the contract was determinable at three months' notice by either party.(a)

(u) *Levison v. Stix*, 12 N. Y. W. Dig. 348 (N. Y. C. P.) citing cases.

(v) *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 454; see *Cawthorn v. Cawdrey*, 32 L. J. C. P. 152.

(w) *Dickson v. Frisbee*, 52 Ala. 165.

(x) *Cole v. Singerly*, 17 Cent. L. J. 195, S. C. Md.

(y) *Russell v. Slade*, 12 Conn. 460.

(z) *Catling v. Perry*, 2 F. & F. 141.

(a) *Collis v. Botthamley*, 7 W. R. 87.

§ 194. Contracts unilateral as well as mutual are within the present clause of the Statute of Frauds.^(b) That one of the terms of the contract was that it should be put into writing, which might have been done within the year, will not take the case out of the Statute.^(c) It is believed that almost every case cited as being within the year clause of the Statute is implicitly inconsistent with the singular view taken in the case of *Sheehy v. Adarene*, in 41 Vermont; there it seems to have been thought that the refusal of the defendant and the consequent breach of contract *infra annum* gave the plaintiff, whose part was not to be performed within the year, a right of suit even on the contract itself.^(d) The court thought that the defendant, whose duty accruing forthwith was violated through his refusal to perform, thereby absolved the plaintiff, whose obligation was not to be performed till *extra annum*, from all duty in the matter, and that a good cause of action not affected by the Statute of Frauds then arose. The following are some examples of contracts not to be performed within a year: Thus, a contract to keep a mare and the colt which should be born of the latter till the colt could be weaned, and then to sell the colt for a certain price, the period of gestation would be eleven months, and that of suckling four to six months more.^(e) So to pay certain money out of the profits of a farm, which profits were to be got from certain nut-bearing trees not yet planted.^(f) So a contract in the spring of one year for the potato crop of the next.^(g) So a contract to deliver timber at a saw-mill and for the profits of the lumber, the capacity of the mill not being sufficient to saw the timber in a year's time.^(h) So to canvass for a book through certain districts, which the plaintiff acknowledged would have taken two years.⁽ⁱ⁾ So an agreement to sell a certain article found,

General
examples
of con-
tracts
within the
year clause.

(b) *Cabot v. Haskins*, 3 Pick. 94.

(c) *Amburger v. Marvin*, 4 E. D. Sm. 393; see, *semble contra*, *Thouvenin v. Lea*, 26 Tex. 612.

(d) 41 Vt. 541; 8 Am. Law Reg., N. S. 331, notes.

(e) *Lockwood v. Barnes*, 3 Hill, 128;

Anon., 11 Pac. C. L. J. 452, S. C. Ind.

(f) *Swift v. Swift*, 46 Cal. 269.

(g) *Pitkin v. Noyes*, 48 N. H. 297.

(h) *Jones v. Post*, 6 Cal. 104.

(i) *Davies v. Appleton*, 25 U. C. C. P. 381.

a statute of the state where the article was found forbidding the sale of things found under a year.(j) Where the contract expressly stipulates for a performance requiring a period greater than a year, the Statute of Frauds, of course, applies. Thus, to supply a saw-mill with timber for two years.(k) So a contract to pay for certain chattels by instalments, the latest in fourteen months from date.(l) A contract to take care of sheep for five years, and to have a share of the increase each year.(m) A contract to buy certain sheep to double their number every four years, and to deliver them to the other party, then a child, when he came of age.(n) A promise to pay a \$100 in four equal annual instalments.(o) So a like promise not to sue for a limited time;(p) and a promise not to engage in a rival business.(p¹) A promise by a father to pay his daughter, then eighteen years of age, \$5000 upon her marriage, if she would stay home and take care of the family, is without consideration for the period between eighteen and twenty-one, the father being at any rate entitled to her services, and after that time is within the year clause of the Statute of Frauds.(q) So a contract to marry in five years.(r) So an equitable mortgage by deposit of title-papers.(s) The following cases in the note are further examples of contracts not to be performed within a year.(t)

(j) *Cummings v. Stone*, 13 Mich. 72.(k) *Patten v. Hicks*, 43 Cal. 511.(l) *Tiernan v. Granger*, 65 Ill. 354.(m) *Ray v. Young*, 13 Tex. 552; see *Buckley v. Buckley*, 9 Nev. 381.(n) *Weir v. Hill*, 2 Lans. 281.(o) *Parks v. Francis*, 50 Vt. 626.(p) *Mills v. Todd*, 83 Ind. 27; see, however, *Dougherty v. Rosenberg*, 10 Pac. C. L. J. 423, S. C. Cal.(p¹) *Weiz v. Rhodius*, 87 Ind. 12.(q) *Bolton v. Terpenney*, 14 N. Y. Week. Dig. 533, S. C. N. Y.(r) *Derby v. Phelps*, 2 N. H. 516; see *infra* and *supra* § 188; and see *Paris v. Strong*, 51 Ind. 342, *infra*.(s) *Gothard v. Flynn*, 25 Miss. 58.(t) *Kelly v. Terrell*, 26 Ga. 552;

Comstock v. Ward, 22 Ill. 248; *Butcher Steel Works v. Atchinson*, 68 Ill. 423; *Wilson v. Ray*, 13 Ind. 1; *Shipley v. Patton*, 21 Ind. 169; *Roberts v. Tennell*, 3 T. B. Monroe, 247; *Holloway v. Hampton*, 4 B. Mon. 415; *Tuttle v. Swett*, 31 Me. 555; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Delano v. Montague*, 4 Cush. 42; *Frary v. Stirling*, 99 Mass. 461; *Pitcher v. Wilson*, 5 Mo. 47; *Esty v. Aldrich*, 46 N. H. 127; *Wilson v. Martin*, 1 Denio, 602; *Lawrence v. Woods*, 4 Bosw. 354; *Lower v. Winters*, 7 Cow. 265; *Kellogg v. Clark*, 23 Hun, 396; *Drake v. Seaman*, 14 N. Y. W. Dig. 375, S. C. N. Y.; *Reinheimer v. Carter*, 31 Ohio St. 587; *Squire v. Whipple*, 1 Vt. 69.

§ 195. Before taking up the subject of the exceptions, real and apparent, to the rule that a contract requiring a year for its performance is within the Statute, it may be well to consider the relation of other clauses of the Statute to the clause of which this chapter treats. It is to be observed, in the first place, that a contract may be within more than one clause of the Statute. Thus, it may be within the year clause and the guaranty clause (see § 213),^(u) or the year clause and the chattel clause.^(v) Where a contract of sale of goods does not require payment until after a year, delivery and acceptance will satisfy the Statute of Frauds both as to the "year" and the "chattel" clause.^(w) But a contract within the year clause and the chattel clause is not saved, it has been held in New York, by part performance as to the year clause.^(x) Or within the year clause and the land clause.^(y) In Indiana it has been decided that a contract within the land clause is not affected by the year clause.^(z) An equitable mortgage for three years, by deposit of title papers, is within the year clause of the Statute of Frauds.^(a) A contract to marry after five years is not the less within the Statute of Frauds that such contracts were not suable at law when 29 Car. II., c. 3, was passed.^(b) A promise to marry is not within the Statute of

The year clause in relation to other clauses of the Statute of Frauds; generally.

(u) See *Jones v. Hardesty*, 10 G. & J. 405, where it was suggested that the payment of a fund into the guarantor's hands might take an oral guaranty, not performable within a year, as well out of the "year" as out of the "guaranty" clause of the Statute of Frauds.

(v) *Pitkin v. Noyes*, 48 N. H. 297; *Jones v. McMichael*, 12 Rich. S. Car. Law, 181; *Lawrence v. Woods*, 4 Bosw. 362; see *Watts v. Friend*, 10 B. & C. 448 and *infra*.

(w) *Suggett v. Cason*, 26 Mo. 225.

(x) *Childs v. Warren Chem. Co.*, 13 N. Y. Weekly Dig. 59, N. Y. S. C.

(y) *Wheeler v. Cowan*, 25 Me. 283; *Comstock v. Ward*, 22 Ill. 248.

(z) *Fall v. Hazelrigg*, 45 Ind. 576, citing cases; the court argued that while part performance satisfied the former, nothing but full performance would satisfy the latter, and that this showed that the two clauses could not consistently be applied to the same contract. See also *Baynes v. Chastain*, 68 Ind. 380; *Cole v. Wright*, 70 Ind. 197.

(a) *Gothard v. Flynn*, 25 Miss. 58.

(b) *Derby v. Phelps*, 2 N. H. 516; see *Paris v. Strong*, 51 Ind. 342.

Frauds; a promise to marry not performable *infra annum* is therefore within the year clause.(c)

§ 196. But the question of leases for more than a year stands on a different basis, and, notwithstanding some contrary decisions, it is certainly the law that a lease
Leases. for more than a year, or for a year beginning at a future date, being within the exception of that clause of the Statute of Frauds which saves oral leases for less than three years, cannot be made invalid by bringing them within the year clause.(d) The same result has been reached in New York, though not without some conflict of decision.(e) A case in fourth Bosworth would appear to be doubtful law under the decisions just cited: it was held that the Statute of Frauds (the year clause) applied to an agreement by landlord and tenant under a seven years' lease, two years of which had expired, that if the tenant would not tear down certain buildings on the premises the landlord would forgive him the rent for the year beginning the first of the month following the agreement.(f) And in a recent case it was held that a contract between partners to assume the liability to pay rent for the remainder of a term which had two years to run is within the year clause:(g) but here the defendant was not a lessee, and therefore his promise did not come within the exception in the Statute of Frauds as to leases. The application of the year clause to leases has been asserted in a number of cases.(h)

(c) Ullman v. Meyer, 10 Fed. Rep. 241, C. C. S. D. N. Y., citing cases, and saying that the third clause of the Statute of Frauds of New York does not make the rule otherwise; this exception is merely declaratory of the previous law.

(d) Bolton (Lord) v. Tomlin, 5 A. & E. 864, denying Inman v. Stamp, 1 Stark. 10, and Edge v. Strafford, 1 C. & J. 391; Marley v. Noblett, 42 Ind. 86; Huffman v. Starks, 31 Ind. 475, citing cases, and denying Edge v. Strafford, and Inman v. Stamp; Sears v. Smith, 2 Col. 288; Anderson v. May, 10 Heisk. 89; Christie v. Clarke, 16 U. C.

C. P. 551; Himesworth v. Edwards, 5 Harring. 377; Eaton v. Whitaker, 18 Conn. 224 (*semble* overruling Janes v. Finney, 1 Root, 549); Sobey v. Brisbee, 20 Ia. 106 (but the effect of the Iowa act is not so clear as that of 29 Car. II., or of the New York statute).

(e) Young v. Dake, 1 Seld. 465; Taggard v. Roosevelt, 2 E. D. Sm. 103; Gilsey v. Wild, 1 Hill, 306; and Crosswell v. Crane, 7 Barb. 194, *contra*, is no longer law.

(f) Lawrence v. Woods, 4 Bosw. 362.

(g) Durand v. Curtis, 57 N. Y. 11.

(h) See Inman v. Stamp, 1 Stark. 10; Edge v. Strafford, 1 C. & J. 391, which

§ 197. The next branch of the subject under consideration is the exceptions to the rule of this chapter. In the first place, contracts capable even contingently of being performed within a year, are not within the terms of the Statute of Frauds.⁽ⁱ⁾ In a case where it was doubtful whether the value of certain chattels sold would be more or less than the value excepted from the 17th section of 29 Car. II., c. 3, it was held in an English case that the Statute applied; upon this case the reporter remarks, that the doubt or contingency which makes an exception to the "year" clause, does not do so to the 17th section.^(j) The following are some general examples of such cases: To pay one a certain sum upon marriage;^(k) a promise to marry within three years;^(l) a promise to marry, at first general in point of time, and then when the promissor returned from a certain voyage which might be at any point thereof, though the voyage *seem* if completed would have required more than a year;^(m)

Exception to the year rule. The contingency rule.

do not, however, speak of the "year," but only of the "land" clause; they *seem* are overruled by Bolton (Lord) v. Tomlin, 5 A. & Ell. 864; Crommelin v. Theiss, 31 Ala. 418; Warner v. Hale, 65 Ill. 396; Wheeler v. Frankenthal, 78 Ill. 126, citing Olt v. Lohnas, 19 Ill. 576; Illinois, etc., R. R. v. Indiana, etc., Ry., 85 Ill. 214, saying that under the Statute of Frauds of Illinois "a contract to pass an interest in land for more than one year must be in writing;" Atwood v. Norton, 31 Ga. 507. See Rosser v. Harris, 48 id. 512 (*seem contra*); see Steininger v. Williams, 63 Ga. 476; Tillman v. Fuller, 13 Mich. 113; Wolf v. Dozer, 22 Kan. 437, citing cases.

An examination of the Statute of Frauds of the above states will show that the leases excepted are for one year, not *three*, as in 29 Car. II., c. 3.

(i) Anonymous, 1 Salk. 280; Anonymous, Comber. 463; Hamilton v.

McDonell, 5 U. C. K. B. O. S. 722; Burney, Adms., v. Bale, 24 Ga. 514; Larimer v. Kelley, 10 Kan. 298; Linscott v. McIntire, 15 Me. 201; Blake v. Cole, 22 Pick. 97; Frary v. Sterling, 99 Mass. 462; Cowles v. Warner, 22 Minnesota Rep. 456, 451; Gault v. Brown, 48 N. H. 183; Moore v. Fox, 10 Johns. 244; McLees v. Hale, 10 Wend. 426; Van Woert v. Albany R. R., 1 Th. & C. 256; Randall v. Turner, 17 Ohio St. 262; Hedges v. Strong, 3 Oreg. 18; Gadsden v. Lance, 1 McMull. Eq. (So. Car.) 90; Thouvenin v. Lea, 26 Tex. 612; Hinckley v. Southgate, 11 Vt. 428; Blanchard v. Weeks, 34 Vt. 592.

(j) Watts v. Friend, 10 B. & C. 448.

(k) Peter v. Compton, Skin. 353; Holt, (Fol.), 326; 1 Sm. L. C., 7th ed. (Amer.), 335; Anon., Comber. 463.

(l) Paris v. Strong, 51 Ind. 342, citing cases.

(m) Clark v. Pendleton, 20 Conn. 508, citing cases. See Anon., 1 Salk. 280.

a promise to pay for trouble in procuring a certain marriage;(n) a contract by which one was to furnish money, the other an invention, and a patent was to be procured, and the profits divided;(o) a contract to pay for a boat presently delivered out of the freight earned;(p) a contract by which cattle were delivered, and to remain the vendor's property till sold.(q) A sale or exchange of land is not within the year clause, because the price was to be paid when a certain suit should be determined, and the suit was not determined *infra annum*.(r) So a promise by the vendee of land to pay the vendor any excess, at which, within five years, he might sell the land, is not within this clause.(s) So a contract of partnership, when no time for its duration was fixed, and it might be performed within the year.(t) A promise to pay a certain sum annually till a certain profit was reached, and then to pay a larger sum.(u) A contract to pay an attorney-at-law from the proceeds of land to be recovered by suit.(v) Where the plaintiff was employed for several years at so much a year, and had been paid half-yearly; the jury had a right to presume that the promise was to pay half-yearly, and if so, the Statute of Frauds did not apply.(w) A contract of insurance for a year from and including the day of contract.(x) A promise to pay for such goods as a third person might order.(y) A contract of indemnity by a co-surety.(z) A promise by a railroad company not to demand a certain subscription to its stock till its road was finished.(a) A contract to erect and maintain a fence.(b)

(n) *Francam v. Foster*, Skin. 326.(o) *Somerby v. Buntin*, 118 Mass. 285.(p) *Bissell v. Bissell*, 4 N. Y. Week. Dig. 338.(q) *Esty v. Aldrich*, 46 N. H. 127; see *Hoore v. Hindley*, 49 Cal. 275.(r) *Derrick v. Brown*, 66 Ala. 162.(s) *Parker v. Siple*, 76 Ind. 350.(t) *Jordan v. Miller*, 75 Va. 450.(u) *Cowles v. Warner*, 22 Minn. 449.(v) *Doe d. McPherson v. Walters*, 16 Ala. 716.(w) *Moore v. Fox*, 10 Johns. 245.(x) See *May on Ins.*, § 18, n. 1; *Sandborn v. Fireman's Ins. Co.*, 16 Gray,455; and see generally, *Walker v. Metropolitan Ins. Co.*, 56 Me. 380; (*First Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305; 28 id. 163; 18 Barb., 79; see *Van Loan v. Farmer's Ins. Co.*, 12 N. Y. W. Dig. 38; *Cramer v. Warren*, 15 N. Y. W. Dig. 134, N. Y. S. C., (y) *Dean v. Tallman*, 105 Mass. 445, and a guaranty generally; *Hoysradt v. Holland*, 50 N. H. 434.(z) *Blake v. Cole*, 22 Pick. 97; see *Knight v. Sawin*, 6 Me. 363.(a) *Indiana R. R. v. Seecorpe*, 23 Ind. 223; *Straughan v. R. R.*, 38 id. 185.(b) *Talmadge v. Rensselaer R. R.*, 13 Barb. 498.

If it is doubtful whether the performance could take place within a year, the Statute does not apply.(c) So, if by a contingency the contract can be performed within the year; the judges in an early English case resolving that this was a *casus omissus* of the Statute.(d) The contingency rule, though now well established, was denied in a case in the Exchequer in 1726, and the court said that if upon a contingency the contract might or might not be performed *infra annum*, the Statute of Frauds applied, and an oral promise to procure a public office, or otherwise to provide for the plaintiff, was held invalid.(e) The following also is an example of a contingency sufficient to take the case out of the Statute of Frauds: Thus, an insurance contract, for the liability may accrue at any time.(f)

§ 198. That a contingency may put an end to the contract, leaving it uncompleted, will not take the case out of the Statute.(g) That a contract capable of performance within the year is not so performed is immaterial.(h) That performance within the year is highly improbable is not enough to make the Statute of Frauds apply.(i) That a corporation will dissolve within a year was thought too improbable.(j)

§ 199. When no time is fixed, the Statute does not apply.(k) Contracts to marry are examples of

A contract left incomplete by a contingency; one capable of performance within the year but not so performed; and one whose performance within the

(c) *Thomas v. Hammond*, 47 Tex. 49.

(d) *Anon.*, Comber. 463; *Peter v. Compton*, *supra*. See cases just cited and *infra*, *passim*.

(e) *Reynolds v. Cowper*, 5 Vin. Abr. 524.

(f) *Walker v. Metropol. Ins. Co.*, 56 Me. 380; see *Wiebeler v. Milwaukee, etc., Ins. Co.*, 30 Minn. 464.

(g) *Wilson v. Ray*, 13 Ind. 6; see *infra*.

(h) *Anon.*, 1 Salk. 280; *Anon.*, Comyn's Rep. 50; *Miles v. Bough*, 3 Q. B. 845; *Linscott v. McIntire*, 15 Me. 201; *Gault v. Brown*, 48 N. H. 183; *Moore v. Fox*, 10 Johns. 244; *McLees v. Hale*, 10 Wend. 426; *Van Woert v. Albany R. R.*, 1 N. Y.

Supreme Ct. 256; *Randall v. Turner*, 17 Ohio St. 262; *Gadsden v. Lance*, 1 McMull. Eq. (So. Car.) 90; *Thouvenin v. Lea*, 26 Tex. 612; *Hinckley v. Southgate*, 11 Vt. 428.

(i) *Lockwood v. Barnes*, 3 Hill, 128; *Blair Town Lot Co. v. Walker*, 39 Ia. 406; *Hedin v. Milton*, 14 Reporter, 392, S. C. Ala.

(j) *Day v. R. R.*, 31 Barb. 548.

(k) *Burdon v. Barkus*, 4 De G. F. & J. 47; *White v. Hanchett*, 21 Wis. 415; *Rogers v. Brightman*, 10 Wis. 65; *Peters v. Westborough*, 19 Pick. 365; *Lewis v. Gray*, 1 Mass. 304, 305; *Suggett v. Cason*, 26 Mo. 224; *Van Woert v. Albany R. R.*, 1 N. Y. Supreme Ct. 256; *Duff v. Snider*, 54 Miss. 251; *Blakeney v. Goode*, 30 Ohio St. 354.

the year is
improbable.

Rule when
no time is
fixed.

agreements in which usually no time is fixed when the promise is made.^(l) A statute exempting stockholders from liability from debts "not to be paid within one year," applies only to debts which cannot be sued on within a year; for all others, including not merely those which may be required to be paid within a year, but also those which are indefinite in time, there is a personal responsibility, the court citing the analogy of the Statute of Frauds.^(m) Where the contract even imposes a continuing duty, yet, if no time of performance is fixed upon, the Statute does not apply; as, for example, a promise to erect and maintain a partition fence.⁽ⁿ⁾ A contract to insure, indefinite in point of time, is not within the Statute of Frauds.^(o) So a promise "altogether" to forbear to bring certain suits at law.^(p) So an engagement by a tenant that the leased premises shall never be used for a certain purpose, the court taking the view that a negative promise could not come within the clause of the Statute.^(q) So in a case not so clear, in which the plaintiff agreed to put the defendant in possession of land as a lessee, and keep him in possession for five years, and the defendant agreed within that period to inclose the land.^(r) A contract to serve for a reasonable time is not within the year clause, though the complaint added, "that is to say, for the period of three years;" this was only the pleader's conclusion.^(s) In a case arising under an English statute requiring written evidence of certain contracts by municipal authorities above a certain sum, it appeared that a doctor had been orally employed to attend patients suffering from an epidemic, and was to be paid at a particular rate, and the disease lasted long enough to make his claim exceed the statutory limit. The court held that, following the analogy of the

(l) *Blackburn v. Mann*, 85 Ill. 222; see *Nichols v. Weaver*, 7 Kan. 373.

(p) *Dougherty v. Rosenberg*, 10 Pac. C. L. J. 423, S. C. Cal.; see, however,

(m) *Dryden v. Kellogg*, 2 Mo. App. 94.

Mills v. Todd, 83 Ind. 27.

(n) *Talmadge v. Rensselaer R. R.*, 13 Barb. 498.

(q) *Leinau v. Smart*, 11 Humphr. 310.

(o) *Cramer v. Warren*, 15 N. Y. Week. Dig. 134, N. Y. S. C.

(r) *Morley v. Noblett*, 42 Ind. 86.

(s) *Niagara Ins. Co. v. Greene*, 77 Ind. 593.

doctrine now under discussion, the plaintiff could recover, for either the municipality or himself could at any time have severed the relation between them, and there might not have been enough sickness to have brought his claim up to the statutory limit.(t) That the contract was not performed within the year is immaterial.(u) As where an agreement to redeem land sold under execution was not performed for several years.(v) Where the plaintiff hired a second-hand piano of the defendant with the right at any time to buy a certain new piano, the rent of the second-hand going towards the price of the new one, no dates were fixed, and after six years the plaintiff called for the new piano, it was held that the Statute of Frauds did not apply, as the plaintiff might have called for his piano within a year after the first month or the first quarter.(w)

§ 200. A contract determinable at any time by either party is not within the Statute of Frauds.(x) As a contract to continue as long as the parties are satisfied.(y) In a case under 8 and 9 W. III., c. 32, making all contracts for transfer of stocks void which ought to have been performed after May 1, unless performable within three years, it was held, not following the analogy of the Statute of Frauds, that a contract made in February to transfer before May 10 upon request was within the Statute; no request was made till after May 15.(z) The continuance of the contract beyond a year by consent does

Contract terminable at any time by either party.

(t) *Eaton v. Basker*, L. R., 7 Q. B. D. 531.

(u) *Van Woert v. Albany R. R.*, 1 N. Y. Supreme Ct. 256; *Miles v. Bough*, 3 Q. B. 845; see § 198.

(v) *Soggins v. Heard*, 31 Miss. 429.

(w) *Duffy v. Patten*, 74 Me. 400, citing cases.

(x) *Cowles v. Warner*, 22 Minn. 456; *Ellicott v. Peterson*, 4 Md. 487; *Sherman v. The Champlain Company*, 31 Vt. 162; *Baptist Church v. Brooklyn Fire Insurance Co.*, 19 N. Y. 305; *McElroy v. Ludlam*, 2 N. J. Law J. 177.

(y) *Greene v. Harris*, 9 R. I. 407; *Fenton v. Emblers*, 1 W. Bl. 352; 3 Burr. 1278; *Knowlman v. Bluett*, L. R. 9 Exch. 307; id. 1; 43 L. J. Exch., 151; 22 W. R., 758; 10 Moak, 467 (n.); *Souch v. Strawbridge*, 2 C. B. 809; 15 L. J. C. P., 170; 10 Jur., 357; *Sherman v. Champlain Co.*, 31 Vt. 182; *Cowles v. Warner*, 22 Minn. 449; *McElroy v. Ludlum*, 2 N. J. Law J. 177; see a *dictum contra* in *Blanding v. Sargent*, 33 N. H. 245.

(z) *Smith v. Westall*, 1 Ld. Ray. 316.

not cause the Statute to apply.(a) As a contract for a year's service and a year thereafter, the service to cease at any time upon two weeks' notice.(b)

§ 201. It has been a question whether a contract for a fixed period greater than one year is not within the Statute of Frauds, notwithstanding the fact that each party may terminate the agreement at any time; it is also a point of much doubt whether a contract for such a fixed time, but determinable by the death of either party, is or is not within the Statute. To take up the former point first it may be said that the weight of American authority is probably in favor of putting contracts for a fixed period in the same category as those in which no time is designated, if determinable upon any contingency *infra annum*. Thus a contract for two years, or until \$500 profit is made, is not within the Statute.(c) So a license to cut trees any time within ten years.(d) So a contract to serve for five years, or as long as L., a certain person, was agent; that is to say, to serve as long as L. was agent, but not longer than five years.(e) A promise to pay when a certain third person paid promissor, and this, though the latter debt was not due for more than a year, because the third person might pay before the debt was due.(f) These cases show a contingency not under the control of the parties, and are therefore strictly not within the special class under consideration; the following, however, are so: Thus, where a subscription was to be cash at once, or notes at a year's time or longer at the subscriber's option, and the subscriber elected to pay cash.(g) A promise to give part of the price of certain land is not within the Statute, though the promisee in buying the land arranged to pay by instalments extending over several

(a) *Tatterson v. Suff. Man. Co.*, 106 Mass. 56; *Church (First Baptist) v. Brooklyn Ins. Co.*, 28 N. Y. 163; 19 id. 305; 18 Barb., 79. discussion of the fixed-period question; *Greene v. Harris*, 9 R. I. 407; see *Hodges v. Richmond Man. Co.*, id. 482; *Southwell v. Beezley*, 5 Or. 143.

(b) *Smith v. Conlin*, 19 Hun, 235; see *Beeston v. Collyer*, 4 Bingh. 309; 12 Moo., 552; 2 C. & P., 608.

(c) See Amer. Law Reg., N. S., Bennett's note to *Davey v. Shannon*, for a

(d) *Kent v. Kent*, 18 Pick. 569
(e) *Roberts v. Rockbottom Co.*, 7 Metc. 46.

(f) *Artcher v. Zeh*, 5 Hill, 204.

(g) *Allen v. Duffie*, 43 Mich. 4.

years.(h) So a contract for services for a time fixed, but determinable sooner at the option of the parties.(i) A partnership for a fixed period being determinable at any time is not within the Statute.(j)

§ 202. On the other hand, there is scarcely one of the points just stated that has not been decided the other way, and the rule in England is clear that an option *Contra.* to determine at any time a contract for a designated period exceeding a year, has no effect in taking the case out of the Statute of Frauds.(k) There is a case which may, though with difficulty, be reconciled with the English rule: it was agreed that there should be a year's service, beginning at a future date, and then to continue by the year, subject to three months' notice; the employé served for several years, and thus the first year of service beginning at a date later than the time of the contract made, was completely performed, and the Statute of Frauds was thus satisfied, and the court held that the Statute did not apply to the later years, each of which began *eo instanti* with the expiration of the previous year.(l) A contract to begin at a future date to furnish a regiment for a year with supplies, subject to be determined if the regiment left the place, has been held to be within the Statute of Frauds;(m) the contingency here is that of an event not under the control of the parties, and it may be a question whether

(h) *Hill v. Smith*, 12 Rich. 700.

(i) *Wilhelm v. Hordman*, 13 Md. 140; *Bernier v. Cabot Man. Co.*, 71 Me. 508.

(j) *Bank (Schuylerville) v. Vanderwerker*, 74 N. Y. 239; see *contra*, *Tomkins v. Randall*, 19 W. R. 416; see § 204, as to contract for a given number of years determinable by death.

(k) *Birch v. Liverpool*, 9 B. & C. 392; S. C., sub nom. *Burch*, 4 M. & R. 380 (the hiring of a carriage for five years, with right by custom of trade to pay for one year and end the contract); *Dobson v. Collis*, 1 H. & N. 81; 25 L. J. Ex. 267 (a contract of service); dis-

tinguishing *Beeston v. Collyer*, and saying that *Sweet v. Lee* was a case where the time did not exceed a year; (*ex parte*) *Acraman*, 7 L. T. N. S. 84; *Pentreguinea Fuel Co., Pegg's Claim*, 4 De G. F. & J. 541 (a contract to supply coal for a series of years); *Booth v. Prittie*, 1 Can. Law T. 724 (6 Ont. App. 680) (a contract of service); *Tomkins v. Randell*, 19 W. R. 416 (a contract for a three years' partnership).

(l) *Collis v. Botthamley*, 7 W. R. 87; see *Booth v. Prittie*, 6 Ont. App. 687.

(m) *Reid v. Harding*, 2 Hann. (N. B.) 138.

the principle of the cases in which the determining factor was the option of the parties should be followed or not. So far as the contingency of death is concerned, the distinction is marked in the English cases between a contract for a fixed number of years and one for life, the former being within the statute, and the latter not.⁽ⁿ⁾ The English doctrine has been followed in a number of American cases; the most important is one in the United States Supreme Court, in which the contingency, like that in the New Brunswick case, just cited, was an event not under the control of the parties. It was a contract to pay for a patent right by a share of the value of the fuel saved by the use of the patent on a boat for twelve years, if the latter should so long last;^(o) the contingency in this case was not the exercise of a choice by either of the parties, but an external event not under their control. A contract by the seller of a patent right to repay the vendee if the profit does not compensate for the price in three years, has been held to be within the Statute of Frauds in a case where the court found that the intention of the parties was that the three years should pass before the contract was considered completed in order to see how the beneficiary stood, for he might lose in his second and third year what he had gained in his first;^(p) if such were the contract, obviously no contingency could complete the contract before the three years' period had expired. It has been held in Delaware that a contract which could not be performed in one year, being by the terms for four years, is not taken out of the Statute of Frauds, because one of the parties reserved the right to annul it at any time.^(q) And this precise adoption of the English rule was approved in a dictum in an Indiana case.^(r)

§ 203. The second subject for consideration is the effect of death as a contingency in determining within a year a contract

(n) See, *infra*, *Murphy v. O'Sullivan*, 11 Ir. Jur. N. S. 111; *O'Sullivan v. Murphy*, 14 W. R. 407; *Davey v. Shannon*, L. R. 4 Exch. P. 87.

(o) *Packet Co. v. Sickles*, 5 Wall. 594, a case which has been much criticized.

(p) *Foote v. Emerson*, 10 Vt. 342; see *Lapham v. Whipple*, 8 Metc. (Mass.) 59, to the same effect.

(q) *Harris v. Porter*, 2 Harr. (Del.)

28.

(r) *Wilson v. Ray*, 13 Ind. 6.

whose performance requires otherwise a longer period. In a case in the English Exchequer it was doubted whether a contract to pay so much down for the support of a child and so much more in four annual payments, which were to cease in case of the child's death, was within the Statute of Frauds.^(s) A contract to support a child then a year old until five years of age, or as long as it should be chargeable to the overseers of the poor, in consideration of a weekly payment, has been held not to be within the Statute.^(t) A contract to support and educate a boy seven years old till majority is determinable by death, and is not within the Statute of Frauds.^(u) A contract to support a child until she was of age, or had married, or until the promissor died, is not within the Statute.^(v) So a contract to support and educate a girl of twelve until she was eighteen, and then to give her certain chattels as pay for her services, is not within the Statute, as the girl might die.^(w) There is, however, a strong current of American authority against the view which gives effect to death as a contingency taking a contract for a fixed period exceeding a year out of the Statute of Frauds.^(x)

The effect of death as a contingency to terminate a contract for a fixed period.

§ 204. The next point of consideration is the effect of death as a contingency to determine a contract which, whether for a fixed period or not, would otherwise take longer than a year to perform. The weight of authority decidedly preponderates upon the side that death is such a contingency as will take a contract out of the Statute of Frauds. Thus, a contract not to engage in certain business is not within the

Death as a contingency affecting a contract, whether for a fixed period or not.

(s) *Crowhurst v. Laverack*, 8 Exch. 213.

That death is a contingency which will take a case out of the Statute of Frauds, see *Jilson v. Gilbert*, 26 Wis. 637.

(t) *McLees v. Hale*, 10 Wend. 428.

(u) *McKinney v. McKinney*, 8 Daly, 369; see *Wilhelm v. Hardman*, 13 Md. 140.

(v) *Frost v. Tarr*, 53 Ind. 390; see *infra*.

(w) *White v. Murtland*, 71 Ill. 266, citing a number of cases, and considering *Hill v. Hooper*, 1 Gray, 131.

(x) *Tague v. Hayward*, 25 Ind. 427 (a contract of service); *Goodrich v. Johnson*, 66 Ind. 262 (a promise to support), citing cases; *Mack v. Bragg*, 30 Vt. 572 (a contract of service); also, *Shute v. Dorr*, 5 Wend. 204; *Jones v. Hay*, 52 Barb. 507; *Hill v. Hooper*, 1 Gray, 131; *Bernier v. Cabot Man. Co.*, 71 Me. 508.

Statute.(y) And this rule has been extended in Massachusetts to promises not to trade for a certain number of years, because such an agreement does not bind the promissor's personal representative, and therefore is determinable by the promissor's death.(z) A contract to support a person for life is not within the Statute.(a) So a contract to make a payment during the life of the payee.(b) Speaking of a contract before them the Supreme Court of Tennessee said: "According to the understanding between the parties it was to be performed at once, and might be fully completed within one year, as by its terms it was to terminate whenever the plaintiff's disabilities, by reason of the injuries received, should cease; and it would, of course, terminate at the plaintiff's death; either of which events might occur within one year. The first event within the year was no doubt contemplated."(c) So a contract to treat an obligation as paid, and to bequeath the note evidencing the debt to the maker of it.(d) So a contract to devise land in consideration of services.(e) A promise by one who bought land from one M. to pay as part of the price \$100 yearly to R., the plaintiff's intestate, from the time of M.'s death until R.'s death, R. being a creditor of M.(f) A contract giving a widow certain rights in land for life.(g) A contract to pay a sum at the death of a certain person is not within the Statute of Frauds.(h) So an agreement

(y) *Roberts v. Rockbottom Co.*, 7 S. 111; *McCormick v. Drummett*, 9 Metc. (Mass.) 48; *Lyon v. King*, 11 id. Neb. 387.
412; *Worthy v. Jones*, 11 Gray, 168; (b) *Saum v. Saum*, 13 West. Jur. 88
Hill v. Jamieson, 16 Ind. 127; *Foster* (District Ct. Ia.); see *Gilbert v. Sykes*,
v. McO'Blenis, 18 Mo. 88; *Blanding* 16 East, 150 (so, also, perhaps, in the
v. Sargent, 33 N. H. 246; *Richardson* case of a promise to pay during the life
v. Pierce, 7 R. I. 330; *Blanchard v.* of a certain third person).
Weeks, 34 Vt. 589. For the opposite
view, see *infra*.

(z) *Doyle v. Dixon*, 97 Mass. 211; (d) *Jilson v. Gilbert*, 26 Wis. 637.
see, *contra*, *Witter v. Gottschalk*, 2 (e) *Quackenbush v. Ehle*, 5 Barb.
Amer. L. Rec. 378 (Super. Ct. Cinn.). 469.

(a) *Ellicott v. Peterson*, 4 Md. 487; (f) *Berry v. Doremus*, 30 N. J. Law,
Hutchinson v. Hutchinson, 46 Me. 156; 402.

Slater v. Smith, 10 U. C. Q. B. 630; (g) *Alderman v. Chester*, 34 Ga. 152.
O'Sullivan v. Murphy, 4 W. R. 407; (h) *Thompson v. Gordon*, 3 Strobbh.
Murphy v. O'Sullivan, 11 Ir. Jur., N. (So. Car.) 196; *King v. Hanna*, 9 B.

between persons about to marry not to claim marital rights in the estate of the other.(i) An agreement to pay for services by a bequest or devise.(j) A contract for personal services is not within the Statute of Frauds, being determinable by death.(k) There is much authority in America for holding that the Statute does not apply to a contract to support a person, even though it be for a term of years named, the contingency of death *infra annum* making an exception to the rule of the Statute.(l) It is at this point that the English courts draw the line of distinction, and it is said that a contract of service for a term certain exceeding a year is within the Statute of Frauds, though made terminable at any period of the service by the death of either party, or by notice, or by the misconduct of the servant.(m) Even an agreement not to trade for a certain number of years is within the Statute of Frauds according to an Ohio decision; the trade might be continued, said the court, by the personal representatives by direction of the testator.(n) An agreement to support a child "till she was able to do for herself" has been held to be within the Statute.(o) So a contract to serve during the employer's life.(p)

Mon. 369; *Sword v. Keith*, 31 Mich. 263; *Ridley v. Ridley*, 34 Beav. 478; 6 N. R., 13; 12 L. T., N. S., 481; 13 W. R., 763; 34 L. J. Ch., 462; *Wells v. Horton*, 4 Bingh. 40; 2 C. & P., 386; 12 Moo., 182.

(i) *Houghton v. Houghton*, 14 Ind. 505.

(j) *Kent v. Kent*, 62 N. Y. 564, citing cases; *Mauck v. Melton*, 64 Ind. 415; *Riddle v. Backus*, 38 Ia. 81.

(k) *Hill v. Jamieson*, 16 Ind. 125; *Russell v. Slade*, 12 Conn. 455; see, *contra*, *Updike v. Ten Broeck*, 13 Vroom, 116.

(l) *Burney v. Ball*, 24 Ga. 505; *Wiggins v. Keizer*, 6 Ind. 252; *Bell v. Hewett*, 24 Ind. 280; *Howard v. Burgen*, 4 Dana (Ky.), 137; *Bull v. McCrea*, 8 B. Mon. 423; *Hutchinson v. Hutchinson*, 46 Me. 154; *Ellicott v. Peterson*, 4 Md. 476; *Peters v. Inhabi-*

tants of Westborough, 19 Pick. 365; *Dresser v. Dresser*, 35 Barb. 573; *Heath v. Heath*, 31 Wis. 223.

(m) *Davey v. Shannon*, L. R., 4 Exch. D. 87, citing many cases; see *Murphy v. O'Sullivan*, *supra*; see, also, *Deaton v. Tenn. R. R.*, 12 Heisk. 653, where the court considered that death would leave the contract incomplete according to the intention of the parties.

(n) *Witter v. Gottschalk*, 2 Amer. Law Rec. (Super. Ct. Cinn.) 378, citing *Packet Co. v. Sickles*; see, also, *Brock v. Becher*, 6 id. 381 (S. C. Ohio); see, *contra*, *Doyle v. Dixon*, 97 Mass. 211; see *supra*.

(o) *Farrington v. Donohoe*, 14 W. R. 922; 1 Ir. Rep. C. L. 675.

(p) *Updike v. Ten Broeck*, 3 Vroom, 116.

So a promise to employ one as solicitor, which was considered to imply employment during the solicitor's professional life, was held to be within the Statute, (g) the Court of Appeal held that there was no contract, and declined to pass on the point of the Statute of Frauds. This case, with the more recent one of *Davey v. Shannon*, go to an extreme not at all warranted by any previous English authority. They deny any effect to the contingency of death in terminating the contract *infra annum* so as to take the contract out of the Statute of Frauds. In *Davey v. Shannon* there was a contract for a fixed period, which the court said would undoubtedly have been within the Statute if it had been completely fulfilled on both sides; the suit was on another stipulation to the effect that the defendant should not trade in a certain place during the joint lives of himself and the plaintiff, and the Statute of Frauds was held to apply. (r) In an American case it has been held that the contingency must be one dependent upon human effort or volition, and not on providential interference, (s)

(g) *Ely v. Positive Ass. Co.*, 1 L. R., 1 Exch. D., 28; 45 L. J. Exch., 62; on appeal, 24 W. R., 252, 338; L. R., 1 Exch. D., 88.

(r) L. R., 4 Exch. Div., 87; 18 Amer. Law Reg., N. S., 554, note by Ed. H. Bennett; *Davey v. Shannon* and *Ely v. Pos. Ass. Co.* have been sharply criticized in the Solicitors' Journal (see 8 Centr. L. J., 482), and in 67 Law Times, 243; both these cases rely on *Roberts v. Tucker*; and *Davey v. Shannon*, cites *Dobson v. Collis*, *Sweet v. Lee*, and *Farrington v. Donohoe*. Of these citations it may be said that in *Roberts v. Tucker* the promise was one to procure certain payments from an official source, which were made yearly (Queen Anne's Bounty), and it seems that even the obtaining of one of these payments could not have taken place within the year; as will be seen later *Roberts v. Tucker* is a doubtful decision under the well-established rule in England

of capability of performance, *infra annum*, of even one side only, being sufficient to satisfy the Statute of Frauds. *Sweet v. Lee* is clearly not in point, for not only is it contrary to the "one-side" rule, but the contract there was to pay an annuity for five years and thereafter for life, and Mr. Justice Hawkins in *Davey v. Shannon* seems to have overlooked the five years' provision. *Dobson v. Collis* was a contract for a fixed period. *Farrington v. Donohoe* and the doubtful case of *Roberts v. Tucker* are met by the following decisions: *O'Sullivan v. Murphy*, 4 W. R. 107; *Murphy v. O'Sullivan*, 11 Ir. Jur., N. S., 111; *Wells v. Horton*, 4 Bingh. 40; *Ridley v. Ridley*, 34 Beav. 478; 12 L. T., N. S., 481; which treat a contract which may be determined by death as not within the Statute of Frauds.

(s) *Tolley v. Greene*, 2 Sandf. Ch. 91.

taking the same distinction as in the English cases cited above, but making a rule directly the reverse of the English. It has been said that death defeats an agreement, not completes it.^(t) In South Carolina it was held by Chancellor Desaussure that a contract to make mutual wills was within the Statute of Frauds; his reasoning denies the "contingency" rule *in toto*.^(u)

§ 205. A question of much interest as to how far an invalid contract not performable within a year can be used by way of defence is so fully considered elsewhere, Defence. that it is not necessary to say more than refer to it here. See the chapter on Defence.

§ 206. An important exception to the rule of the Statute is well established in England, and to some extent, but not generally so, in the United States. It has been One side rule. decided, namely, that a contract capable of performance on one side within a year will be enforced, though oral only, and though the other side will require more than a year for its performance.^(v) In argument in the leading case of *Boydell v. Drummond*,^(w) Lord Ellenborough said, that the delivery of goods which is supposed to be made in the year, would be a complete execution of the contract on one part; and the question of consideration would be reserved for the future; this is the origin of the "one side" rule. The following are some examples of this very extreme exercise of the right of judicial interpretation in nullifying an express enact-

(t) *Wilkinson v. Hardt*, a Massachusetts case, cited in *Browne on S. of F.* (2d ed.), § 286, n.; see *Deaton v. Tenn. R. R.*, 12 Heisk. 653; *Udike v. Ten Broeck*, 3 Vroom, 116.

(u) *Izard v. Middleton*, 1 Des. Ch. 116.

(v) *Bracegirdle v. Heald*, 1 B. & A. 722; *Donellan v. Read*, 3 B. & A. 904; *Cherry v. Heming*, 4 Exch. 636, commenting on *Peter v. Compton*; *Halleran v. Moon*, 1 Can. Law Times, 104; 28 Grant, 319; *Christie v. Dowker*, 10 Grant, 200; *Rake v. Pope*, 7 Ala. 161; *Johnson v. Watson*, 1 Ga. 350; *Cur-*

tis v. Sage, 35 Ill. 39 (citing *Brown on S. of F.*, to the effect that this is the law of Maine, Massachusetts, and the Western and Southern states, but not of New York); *Houghton v. Houghton*, 14 Ind. 505; *Smalley v. Greene*, 52 Iowa, 243; *Jones v. Hardesty*, 10 G. & J. 417; *Holbrook v. Armstrong*, 10 Me, 31; *Blanton v. Knox*, 3 Mo. 242; *Talmadge v. R. R.*, 13 Barb. 498; *Blanding v. Sargent*, 33 N. H. 246 (dictum); *Gee v. Hicks*, 1 Rich, Eq. 5; *Bates v. Moore*, 2 Bailey, 614; *Rogers v. Brightman*, 10 Wis. 65 (dictum).

(w) 11 East, 142; 2 Campb. 157.

ment. Thus, where a contract was to transfer to the defendant a patent right, the defendant agreeing that if in a certain number of years he did not pay a certain sum, the patent was to revert to the plaintiff; the transfer by the plaintiff was held to be performable *infra annum*, and that therefore the Statute of Frauds did not apply.^(x) So, an agreement to take land and put in two successive annual crops, and share these crops.^(y) So, a promise by the defendant, that if the plaintiff would buy certain land, subject to a mortgage, and convey it to the plaintiff's wife, he, the defendant, would pay the mortgage interest, and would make certain yearly payments to the plaintiff.^(z) So, a promise to get the plaintiff a situation as clerk at \$1000 per annum, if the plaintiff would convey his interest in certain land to the defendant, and procure the other owners of the land to do so also, is not within the Statute of Frauds, as one side might be performed within a year.^(a) An oral contract performable on either side within a year being valid under the Statute of Frauds, it is immaterial that the part to be performed within the year was a certain payment in notes, some of which did not fall due till after a year.^(b) A contract not to trade for two years is not within

(x) *Smith v. Neale*, 2 C. B. N. S. 66; 26 L. J. C. B. 143; see, for a like ruling, *Cherry v. Heming*, 4 Exch. 636.

(y) *Poulter v. Killingbeck*, 1 B. & P. 398.

(z) *Halleran v. Moon*, 1 Can. Law T. 104; 28 Grant, 319.

(a) *Bennett v. Peck*, 2 Pug. N. B. 322.

(b) *Whittaker v. Welch*, 2 Pug. N. B. 444. Where the plaintiff, an administratrix, agreed for a yearly sum to give the defendant, a physician, the good-will of her intestate's practice as a physician, and to give him a three years' lease of the intestate's surgery; the plaintiff put the defendant in possession of the surgery, and tried to get the practice; it was held that the "year" clause did not apply. The "one-side" rule being relied on, the

4th section did not apply, as either the agreement was to give a tenancy from year to year for the three years, which contract was substantially executed by partial enjoyment with no prospect of disturbance, or, on the other hand, the agreement was for a three years term. In the former alternative, though there was evidence to support it, the year clause objection would have applied, as the plaintiff's part was not performed, and could only be so as each year passed. But the evidence did not show whether the contract for the lease was on or before the day the lease began; if on that day, the case was within the exception to the Statute of Frauds, if before, no objection on the ground of the 4th section of the Statute was taken. *Christie v. Clarke*, 16 U. C. C. P. 551.

the Statute, where all the consideration is to be paid within the year.(c) So, a contract of purchase of land, the price to be paid in a series of instalments; in the event of certain deaths, the amount might have been all due *infra annum*, but the decision was rested on the rule of *Donellan v. Read*.(d) So, a vendor's lien for the price of land sold, the conveyance being *infra annum*.(e) So, a contract between persons about to marry, not to claim marital rights in the property of each other.(f) A contract to hire a negro for a year, who was to be delivered in three days.(g)

§ 207. The law in New York on the present point has shown a great conflict of opinion. Some of the cases which appear to favor the rule of *Donellan v. Read*, do not perhaps go so far, but only support a recovery not when the contract is *performable* on one side *infra annum*, but when it is actually so performed.(h) The question has been referred to as doubtful in some American cases.(i) Where one party has it in his power to perform his part of the contract within a year, and can then exact compensation from the other, the Statute of Frauds does not apply, but this contemplates performance *infra annum* by both parties.(j)

New York cases under the one side rule.

§ 208. Though one of the parties has it in his power to put an end to a contract within the year, yet if, independent of the exercise of such power, the contract cannot be performed within a year the Statute applies.(k) In a late Mississippi case the rule of *Donellan v. Read* was said to be a mere matter of pleading, as recovery could be had on the common counts where the con-

One side rule modified, doubted, or denied.

(c) *Perkins v. Clay*, 54 N. H. 518.

(d) *Berry v. Doremus*, 30 N. J. Law, 402, citing many cases; see *Saum v. Saum*, 13 West. Jur. 88 (Ia. Dist. Ct.).

(e) *Haugh v. Blythe*, 20 Ind. 27; see *Miller v. Roberts*, 18 Tex. 19; *Compton v. Martin*, 5 Rich. So. Car. 14.

(f) *Houghton v. Houghton*, 14 Ind. 505.

(g) *Blanton v. Knox*, 3 Mo. 242.

(h) See *Wooster v. Sage*, 6 Hun, 288; 67 N. Y., 68; *Pitkin v. Long Island R. R.*, 2 Barb. Ch. 230; *Smart v. Smart*, 24 Hun, 128.

(i) *Berry v. Graddy*, 1 Metc. (Ky.) 556; *Cabot v. Haskins*, 3 Pick. 94; *Wilson v. Ray*, 13 Ind. 6.

(j) *Plimpton v. Curtis*, 15 Wend.

336.

(k) *Blanding v. Sargent*, 33 N. H. 246.

sideration had been received.^(l) The "one side" rule of *Donellan v. Read* has met with much opposition in America.^(m) In a well-known Vermont case the distinction is made between a suit against the party who should perform within the year, and one against the party whose performance is to be *extra annum*, holding that in the latter case the Statute of Frauds applies, and in the former it does not; the point is novel, and can scarcely be said to be supported by authority, because, while in a number of cases the Statute has been held a good defence on behalf of the party whose performance requires more than a year; there are some examples of a recovery on the "one side" rule being allowed against such a person.⁽ⁿ⁾ The question received very full consideration in a Massachusetts decision, in which the court held that a promise to pay in three years for land to be presently conveyed, was within the year clause of the Statute of Frauds, and said that the "one side" rule introduces an exception of part performance to the Statute of Frauds, and that this rule would take all cases on an executed consideration out of the Statute; the rule was said to have originated in a dictum of Lord Ellenborough's, made

(l) *Duff v. Snider*, 54 Miss. 251; see *Pierce v. Paine*, 28 Vt. 36; *Emery v. Smith*, 46 N. H. 151, and *infra*.

(m) *Amburger v. Marvin*, 4 E. D. Sm. 395; see *Broadwell v. Getman*, 2 Denio, 87; *Weir v. Hill*, 2 Lans. 278; *Bartlett v. Wheeler*, 44 Barb. 163, citing cases; *Kellogg v. Clark*, 23 Hun, 396, citing cases; *Quackenbush v. Ehle*, 5 Barb. N. Y. 469; *Davenport v. Gentry*, 9 B. Mon. 427; *Pierce v. Paine*, 28 Vt. 37 (citing *Peter v. Compton* as a case fully performed *infra annum*, and yet within the Statute of Frauds); *Marcy v. Marcy*, 9 Allen, 8; *Frary v. Sterling*, 99 Mass. 462; *Whipple v. Parker*, 29 Mich. 371; *Wilson v. Ray*, 13 Ind. 1; see, also, *Tiernan v. Granger*, 65 Ill. 354; *Carter v. Brown*, 3 Richardson (N. S.), 298; *Harriman v. Park*, 55 N. H. 472; *Emery v. Smith*, 46 id. 151; *Herrin v. Butters*, 20 Me. 121.

(n) *Sheehy v. Adarene*, 41 Vt. 541; 8 Amer. Law Reg., N. S. 331, notes citing cases; see *Broadwell v. Getman*, 2 Denio, 88. The recovery was thought to be allowable on a *quantum meruit* only, and in *Sheehy v. Adarene* there was the further view that the defendant by a breach of the contract *infra annum* took the case out of the Statute of Frauds: as to the lack of value to this theory see *supra*. As instances of recovery against the party whose performance extended beyond a year, on the ground that the plaintiff's performance was *infra annum*, see *Berry v. Doremus*, *Haugh v. Blythe*, *Perkins v. Clay*, and other cases cited above; see, also, *infra*, *Sweet v. Lee*, where a plaintiff performing *extra annum* was not allowed to recover against a defendant who could perform *infra annum*.

during the argument of counsel in *Boydell v. Drummond*; it was doubted in Smith's notes to *Peter v. Compton*, and by Judge Coltman, in *Souch v. Strawbridge*, and by Maule, J., in *Sweet v. Lee*; that the subject was never fully discussed in England, where the cases were those of a fully executed consideration on one side; and query, whether under English authorities more can be recovered than the value of a consideration received by the defendant from the plaintiff?(*o*) In one English case the rule of *Donellan v. Read* seems to have been denied, and it was held that a contract by which the plaintiff, a publisher, was to pay the defendant a certain sum annually for five years, and a certain other sum for life, and the defendant was to write a law book for the plaintiff, is within the year clause, though the defendant's part might have been executed, it would seem, within the year.(*p*) So in a case in Nova Scotia, the "one side" rule was denied, and the "one side" cases said to be hard to reconcile with the *Wain v. Warlters* rule, viz., that the agreement embraces both sides.(*q*) So an oral agreement to pay after more than a year for land to be presently conveyed, has in New York been held to be within the Statute of Frauds.(*r*)

§ 209. There is a well-founded distinction between the capability of entire performance on one side, within the year, and the actual performance; and authorities which would allow recovery in the case of actual performance of one side would not necessarily support such a conclusion where there is only a mere possibility of such performance. The preponderance of American authority cannot be easily ascertained; it prob-

Distinction between actual, and only possible execution of one side of the contract.

(*o*) *Marcy v. Marcy*, 9 Allen, 9, denying the English rule, and claiming the law of Vermont and New York to be the other way; citing *Broadwell v. Getman* and *Pierce v. Paine*, *supra*.

(*p*) *Sweet v. Lee*, 5 Jur. 1134; 4 Scott N. R. 77; 3 M. & G. 452; see *Roberts v. Tucker*, 3 Exch. 632, where the plaintiff by undertaking a curacy, seems to have done all of his side of the contract, the defendant's promise being

to procure him a certain yearly stipend as curate.

(*q*) *Meek v. Gass*, 2 Russ. & Ch. 246, citing *Cocking v. Ward* and *Kelly v. Webster*, and relying on *Pierce v. Paine*, and reviewing *Donellan v. Read* and like decisions.

(*r*) *Kellogg v. Clark*, 23 Hun, 396, citing *Marcy v. Marcy*, *Broadwell v. Getman*.

ably leans to the view which denies to anything less than complete execution of both sides of the agreement, the effect of satisfying the Statute of Frauds. It has been, indeed, held that a full, actual performance of either side of the contract is sufficient.^(s)

§ 210. In the next section will be considered the special class of cases in which the contract not to be performed within a year is one relating also to the sale or lease of land, or the sale of "goods, wares, or merchandise," and in which part performance of any part of the contract, or entire performance of one side thereof, may have a greater effect, under the "land," "lease," and "chattel" clauses respectively of the Statute of Frauds, than such performance of an agreement coming only within the "year clause" would have. It may be well first to give some examples of contracts which have been held not to be within the year clause because of the entire performance of one side of the contract, but which do not belong to the category just referred to. Thus, it has been held that certain cases which on both sides relate rather to money than to "goods, wares, or merchandise," and therefore, not affected by the rule of delivery and acceptance, are yet valid when the plaintiff has paid all that he has promised; thus, where the plaintiff gave the defendant \$3000 to pay him \$100 per annum for life, the Statute of Frauds is satisfied by the plaintiff's payment.^(t) A promise by persons about to marry not to claim marital rights in the property of each other is *semble* fully performed on one side by the marriage, and the abstinence of the husband in asserting such rights.^(u) A sale of a business, etc., is a full performance of one side of a contract not to trade for two years in the same vicinity.^(v) So the entering into a

Examples
under the
entire per-
formance
of one side
rule.

(s) McClellan v. Sandford, 26 Wis. 609; Bell v. Hewett, 24 Ind. 280 (a contract of service); see Reinheimer v. Carter, 31 Ohio St. 587, as an example of incomplete performance of one side; Atwood v. Fox, 30 Mo. 499; Burney v. Ball, 24 Ga. 514; Jilson v. Gilbert, 26 Wis. 637; see Gee v. Hicks, 1 Rich. Eq. Ca. 17.

(t) Saum v. Saum, 13 West. Jur. 88 (Ia. Dist. Ct.), as to a valid payment *infra annum* by notes due *extra annum*; see Whittaker v. Welch, 2 Pug., N. B. 444, *supra*.

(u) Houghton v. Houghton, 14 Ind. 505.

(v) Perkins v. Clay, 54 N. H. 518; see Meek v. Gass, 2 Russ. & Ch. 246.

partnership is the full performance of one side of a contract of partnership agreed upon to continue for several years.(w) So Chief Justice Tindal expressed himself as of the opinion that a contract to support a child, which had been entirely performed by the plaintiff, might be likened to a contract on an executed consideration, and a recovery be allowed as in the case of goods sold and delivered.(x) And in an early case in Connecticut it was held that the consideration of a contract to board a person for two years might be recovered by a plaintiff who had done all his part.(y)

§ 211. There is a modification of the rule in some of the cases, which, apparently allowing a recovery of the consideration stipulated for in the contract, decide that the action must be on a *quantum meruit* and not on the special contract. Thus, where the plaintiff's father agreed with the defendant that the latter should take the plaintiff, then eleven, and keep him till twenty-one, and, when of age, give him a cow, and, according to some evidence, nothing more, but according to other evidence various amounts of money; the plaintiff gave him the cow, but no money, and the plaintiff sued on a *quantum meruit* for the value of services, and the defendant set up the oral contract, contending that by it no money was due; it was held that evidence of the oral contract was admissible, and a new trial ordered; the jury below having found for the plaintiff. The court considered the part within the Statute of Frauds completely executed, and cited the analogy of a suit for price of land conveyed.(z) In *Pierce v. Paine* it

Compensation on a *quantum meruit* for entire performance of one side.

(w) *Smith v. Tarlton*, 2 Barb. Ch. 337; *Pickin v. Hawkes*, Court of Sess. Cases, 5 R. 677.

(x) *Souch v. Strawbridge*, 2 C. B. 808; 15 L. J. C. P., 170; 10 Jur., 357; see *Ex parte Acraman*, *In re Pentreguinea Co.*, *Pegg's Claim*, noting this point, and distinguishing the principal case as one in which the plaintiff's engagement was not fully executed.

(y) *Ives v. Gilbert*, 1 Root, 89.

(z) *Van Valkenburg v. Croffut*, 15

Hun, 148, citing several cases, and distinguishing *Shute v. Dorr*, *Jones v. Hay*, as suits on contracts only partially performed, and *Bartlett v. Wheeler* as a case where there was no continuing performance by plaintiffs, and *Erben v. Lorillard* as a case where defendant's assumpsit was one relating to land; see *Broadwell v. Getman*, 2 Denio, 57; *Pitkin v. Long Island R. R.*, 2 Barb. Ch. 221; *Quackenbush v. Ehle*, 5 Barb. 469; *Davenport v. Gentry*, 9 B. Mon.

was suggested that recovery of the consideration might be as well under the common counts as under the special contract, but this must mean a recovery merely of what the party had expended, and that the form of action was immaterial; but in a late Mississippi case^(a) it was said that the one side rule was a mere question of pleading, as in a suit on the common counts the special contract could be put in evidence.^(b) The principles which determine this last point belong more properly under the head of compensation for acts of part performance; and in the chapter relating to the latter doctrine the special application of it to contracts not performable within a year will be considered.

§ 212. The following are examples of contracts relating to land, and entirely performed on one side within a year: In *McClellan v. Sandford* it was said that the question is, whether the agreement falls within the clause of the Statute because not to be performed within one year, or whether its having been fully performed on one side, by the execution and delivery of the deed, takes it out of the Statute; the authorities upon this question are divided, though with a decided preponderance in favor of the validity; in Massachusetts, New Hampshire, Vermont, and New York, it is held that a promise to pay not reduced to writing and subscribed by the party is within the Statute, and no action can be maintained upon it, if not performed within one year, although made upon a full and valuable consideration executed by the promisee and received by the promisor at or before the time.^(c) On the other hand, the English courts and courts of many of the states hold the very opposite doctrine, that performance on one side at the time, or within the year takes the contract out of the Statute, and that it may be enforced.^(d) *Seem* the receipt of valuable

427; *Pierce v. Paine*, 28 Vt. 37; *Emery v. Smith*, 46 N. H. 151; *Marcy v. Marcy*, 9 Allen, 8; *Wilson v. Ray*, 13 Ind. 1; *Meek v. Gass*, 2 Russ. & Ch. 246; *Wier v. Letson*, 3 id. 301.

(a) *Supra*; see *Emery v. Smith*.

(b) *Duff v. Snider*, 54 Miss. 251; but see *Emery v. Smith*.

(c) 26 Wis., 609, citing *Marcy v. Marcy*; *Emery v. Smith*; *Pierce v. Paine*; *Broadwell v. Getman*; *Lockwood v. Barnes*.

(d) *Id.*, citing many cases.

consideration is such execution that a contract within this clause is taken out of the Statute of Frauds.^(e) So a vendor's lien for purchase-money to be paid *extra annum* for land presently conveyed.^(f) So a promise to assume a mortgage on land presently conveyed.^(g) So where the defendant agreed by parol to convey to the plaintiff certain real estate and to receive in part payment thereof a stock of goods in a store, and the unexpired term of about fourteen months of a lease thereof given by the owners to the plaintiff, the defendant agreeing to pay the rent to fall due upon the lease to the lessors; the agreement was carried into effect. Subsequently the defendant having assigned the lease, and neglected to pay the rent, this action was brought by the plaintiff upon the said agreement to recover the amount due; the court held that the plaintiff's part was fully executed, and that therefore the Statute of Frauds did not apply.^(h)

§ 213. It will be well to note here, that in these last cases the "land" clause of the Statute of Frauds applied as well as the "year" clause, see § 195, and that the former was undoubtedly satisfied by the voluntary performance of the part relating to the land, leaving unexecuted only that part which related to the payment of the money, etc. Now it is an interesting question, if we deny the full performance of one side of a contract within the "year" clause any effect in satisfying the Statute, whether, supposing the side so performed was within the "land" clause, the effect of the full performance while sufficient to satisfy the latter, is or is not sufficient to satisfy the year clause. There is some authority, as may be seen elsewhere, for saying that if the land clause applies to a contract as well as the year clause, and the former is satisfied, the latter is so too; no doubt a lease for less than three, but more than one year, is not within the year clause, owing to the express exception in the clause relating to leases; the question, therefore, remains, does the implied exception

The effect of full performance of one side when the contract is within the year clause, and also within the "land" or "leases" clause.

(e) *Jones v. Hardesty*, 10 G. & J. 417.

(f) *Haugh v. Blythe*, 20 Ind. 27.

(g) *Curtis v. Sage*, 35 Ill. 39; see *McClellan v. Sandford*, 26 Wis. 609.

(h) *Smart v. Smart*, 24 Hun, 128.

which arises from a full or voluntary performance of all that part relating to the land possess the same potency? (i) It has already been seen that a contract relating to leases is governed entirely by the "leases," and not affected by the "year" clause, though it might be within the literal wording of the latter, and that, therefore, by the preponderance of authority a lease for more than one, but less than three years, is valid, though oral. Now, the next point is, whether a contract which would be taken out of the "leases" clause by part performance will also be taken out of the "year" clause. That it will, there is good reason to think. Thus, a lease for a year beginning *in futuro* if executed by actual demise has in England been held not to be within the "year" clause of the Statute of Frauds. (j) So in Georgia. (k) In Illinois it has been expressly decided that part performance will take a contract as to land, not only out of that, but also out of the year clause; (l) and in an Indiana case it was held that a contract within the land clause was never within the year clause, and the argument was used that part performance satisfying the former, and nothing less than full performance the latter, it was inconsistent to apply both clauses of the Statute to the one contract. (m) The case of sales of land actually fulfilled by a conveyance differs from that relating to leases, so far as that there are certain leases which by the language of one clause of the Statute of Frauds are good, though oral if for less than three years, and yet are strictly within the "year" clause; while the oral sales of land are held good, not under the express terms of the Statute, but only by the implied or equitable exception of full or part performance; this exception, it was thought in *Boydell v. Drummond*, was of less weight than an express exception in the Statute of Frauds itself, and that performance was not sufficient to take a contract not performable within a year out of

(i) *Boydell v. Drummond*, 11 East, 142, says that part performance is not strictly an exception to the Statute of Frauds, but is only an equitable doctrine.

(j) *Bolton (Lord) v. Tomlin*, 5 A. & Ell. 856.

(k) *Steininger v. Williams*, 63 Ga. 476, citing cases, and see Code Ga., § 1951; see also, *Tillman v. Fuller*, 13 Mich. 113.

(l) *Blunt v. Tomlin*, 27 Ill. 93.

(m) *Fall v. Hazelrigg*, 45 Ind. 576.

the Statute. But besides the cases already cited, a case in 35 Texas, has a bearing on this point; the facts were, that one Schroeder (the plaintiff below) conveyed land by deed to Zabel (the defendant below), who paid a portion of the price and went into possession of and resided upon the property; Schroeder sued for the balance of the purchase-money, which, as specified, was due in two instalments, one at twelve and the other at eighteen months, and it was held that the "year" clause of the Statute of Frauds was no defence to the action.⁽ⁿ⁾ On the other hand, it has been decided in New York, that an oral promise to pay *extra annum* for land to be conveyed at once, is within the "year" clause; thus denying the view asserted above,^(o) that performance sufficient to take a contract out of the "land" clause will also take it out of "year" clause, should it happen to come within both.

§ 214. The "chattels" clause, like that relating to "leases," contains an express exception in favor not merely of contracts like two years' leases, for example, which might otherwise come within the "year" clause, but in favor of certain part performance, and it is a question whether, as leases for less than three years, though for more than one, are not within the "year" clause; so a contract for chattels, followed by delivery and acceptance of the articles, being within the exception of the chattels clause, should not be valid even under that relating to contracts not capable of performance *infra annum*. The following are some examples of contracts relating to chattels, and not to be performed within a year, being held valid, because one side of the contract was entirely performed. Thus, an agreement by the buyer of a mortgage past due, not to collect the principal for five years, for which he received a money consideration from the buyer of the land mortgaged, was held to be executed and not within the Statute.^(p) So, where a slave was delivered in consideration of a certain promise of services

(n) Zabel v. Schroeder, 35 Tex. 311; see also, Little v. Little, 36 N. H. 299; Doty v. Martin, 32 Mich. 468. citing Marcy v. Marcy; Broadwell v. Getman.

(p) Dodge v. Crandall, 30 N. Y. 294.

(o) Kellogg v. Clark, 23 Hun, 396,

extending over two years.(q) And even where the whole promise as to the chattels is not performed within the year, delivery and acceptance is sufficient to satisfy as well the "year" clause as the "chattels" clause; thus, a sale of chattels with a stipulation that the seller will take them back if the buyer should become dissatisfied, and, after two years, the buyer tendered them back, the original delivery and acceptance was held to take the case for all purposes out of the Statute of Frauds.(r) So, a contract is valid where a machine is sold and delivered on the consideration that the vendee should use no other machine for five years.(s) The consideration in these cases must have enured to the defendant;(t) even where the chattels are not by the terms of the contract to be delivered *infra annum*, if they are delivered and accepted the Statute of Frauds is satisfied.(u)

§ 215. Even this qualified exception to the Statute of Frauds has been denied in some cases which have held that full performance by one party within the year will not take that part which is to be performed after a year out of the Statute.(v) In an Indiana case the point was raised but not decided.(w) In a well-known Vermont case the effect even of full performance of one side of a contract, in taking the other side out of the "year" clause, was positively denied; there the facts were that, under the contract, the plaintiff was to buy certain shares of stock, and that after a year he was to have the option of keeping them or of transferring them to the defendant; in the former alternative he was to make certain payments, in the latter the defendant was to make them; the plaintiff buying the stock was under the circumstances held to have no effect in satisfying the Statute of Frauds.(x) Whether the one side is executory or

Contra to the last rule.

(q) *Johnson v. Watson*, 1 Kelly, 350. See generally where goods are delivered *infra annum* to be paid for *extra annum*. *Suggett v. Cason*, 26 Mo. 225.

(r) *Wooster v. Sage*, 67 N. Y. 68; 6 Hun, 288, citing cases.

(s) *Self v. Cordell*, 45 Mo. 345.

(t) *Pierce v. Paine*, 28 Vt. 37.

(u) *Barkley v. Rensselaer R. R.*, 71 N. Y. 206.

(v) *Saunders v. Kastenbine*, 6 B. Mon. 17; *Weir v. Hill*, 2 Lans. 278; see *Hinckley v. Southgate*, 11 Vt. 428.

(w) *Wilson v. Ray*, 13 Ind. 6.

(x) *Pierce v. Paine*, 28 Vt. 36; see *Emery v. Smith*, 46 N. H. 151, saying

executed was said to be the same.(y) A like conclusion was reached where the contract was in consideration of a dollar paid to buy sheep, and double them every year for four years; the payment of the dollar was insufficient performance, though an actual delivery of the sheep might have been enough.(z) In a New York case a promise by the defendant, to whom the plaintiff let ten sheep to return the plaintiff twenty in four years, was held to be within the Statute of Frauds, and this notwithstanding the delivery of the ten sheep.(a) A contract of hire of negroes to be delivered at once, and the price to be paid in twenty months, has been held to be within the Statute of Frauds.(b)

§ 216. The exception in the case of chattels arising from part performance merely, leads naturally to a consideration of the effect of the latter upon contracts generally not performable within a year. Part performance must be distinguished from entire performance of one side of the contract, which is rather in the nature of full performance of that part of the contract to which the Statute of Frauds applies, leaving executory only such part of the contract as is not within the Statute. Whether the entire performance of the side of a contract, which is to be performed *within* a year, should be considered as coming within the principle of full performance, may be doubted; unless the contract is to convey an interest in land within the year, to be paid for *extra annum*, in which case the performance being sufficient to satisfy the "land" clause, may perhaps be treated as sufficient to satisfy the "year" clause also. Part perform-

Part performance generally.

that the rule of entire performance of one side on executed consideration as laid down in *Souch v. Strawbridge* was questioned in *Cherry v. Heming*. In

(*ex parte*) *Acraman*, 7 L. T., N. S. 84; *Pentreguinea Fuel Co.*, 4 De G. F. & J. 541, *Pegg's Claim*, *Souch v. Strawbridge* was recognized but distinguished, the *Acraman* contract not being capable of execution till the expiration of the full period, which was longer than

a year. See *Pitkin v. Long Island R. R.*, 2 Barb. Ch. 230.

(y) *Bartlett v. Wheeler*, 44 Barb. 163.

(z) *Weir v. Hill*, 2 Lans. 281, citing cases, and distinguishing *Dodge v. Crandall* as a case of entire performance.

(a) *Bartlett v. Wheeler*, 44 Barb. 163, citing *Pierce v. Paine* and *Broadwell v. Getman*.

(b) *Davenport v. Gentry*, 9 B. Mon. 427.

ance rests on a different basis, and is sufficient in equity as to land, because of the inequitable consequences to the person partly performing of applying the Statute of Frauds, and is sufficient at law as to chattels, because of the express exception contained in the seventeenth section of the Statute. Apart from the case of contracts which come not only within the "year," but also within either "land" or the "chattels" clause, it may be said that part performance of a contract, not to be performed within a year, has no effect in taking the agreement out of the Statute of Frauds.^(c) The fact that the contract is begun but not completed within the year is immaterial.^(d) So one payment under a contract to make a series of annual payments does not satisfy the Statute.^(e) So part performance by service.^(f) In a recent English case of a contract for services partly performed, the Lords Justices said that sec. 24, subsec. 7, of the Judicature Act of 1878, relates to procedure only, and does not extend the doctrine of part performance to the "year" clause of the Statute of Frauds.^(g) The fact that a servant engaged under a contract within the "year" clause came from Germany to America to perform his agreement does not take the case out of the Statute.^(h) So a delivery of a crop under a contract to deliver crops dur-

(c) *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Scoggin v. Blackwell*, 36 Ala. 351; *Treadway v. Smith*, 56 Ala. 345; *Blunt v. Tomlin*, 27 Ill. 93; *Warner v. Hale*, 65 Ill. 396; *Houghton v. Houghton*, 14 Ind. 505; *Fall v. Hazelrigg*, 45 Ind. 576; *Anon.*, 11 Pac. C. L. J., 425, S. C. Ind.; *Kleeman v. Collins*, 9 Bush, 460; *Davenport v. Gentry*, 9 B. Mon. 428; *Sharp v. Rhiel*, 55 Mo. 97; *Emery v. Smith*, 46 N. H. 151; *Lockwood v. Barnes*, 3 Hill, 128; *Wilson v. Martin*, 1 Denio, 605; *Van Woert v. Albany R. R.*, 1 N. Y. Supreme Ct. 256; *Oddy v. James*, 48 N. Y. 685; *Barkley v. Reusselaer, etc.*, R. R., 71 N. Y. 207 (*semble*); *Smith v. Bowler*, 2 Disney, 156; *S. C. of Cincinnati aff'g S. C.*, 1 id. 520; *Bates v. Moore*, 2 Bailey, 614;

Foote v. Emerson, 10 Vt. 342; see *Sherman v. Champlain Co.*, 31 Vt. 182, discussing the cases; *Parks v. Francis*, 50 Vt. 628.

(d) *Atwood v. Fox*, 30 Mo. 499, citing cases; *Lockwood v. Barnes*, 3 Hill, 128; *Foote v. Emerson*, 10 Vt. 342; *Boydell v. Drummond*, 11 East, 142.

(e) *McElroy v. Ludlum*, 2 N. J., L. J., 177; 32 N. J. Eq. 828; see *Saunders v. Kastenbine*, 6 B. Mon. 17; *Parks v. Francis*, 50 Vt. 628.

(f) *Comes v. Lamson*, 16 Conn. 246.

(g) *Brittain v. Rossiter*, 48 L. J. Exch. 362; 40 L. T., N. S., 240; 27 W. R., 482; 11 Q. B. D., 123.

(h) *Turnow v. Hochstadter*, 7 Hun, 80.

ing a series of years.(i) In an early Connecticut case part performance seems to have been an exception to the "year" clause of the Statute of Frauds.(j) And in California part performance will take an oral lease out of the Statute.(k) And in Georgia entering into service as a clerk is sufficient part performance of a contract covering several years.(l) Where, in order to fulfil a contract of service (*semble* for a year beginning at a future date), the plaintiff goes to expense and trouble in moving from New Jersey to Wisconsin, the part performance satisfies the Statute of Frauds, but query whether in the opinion of the court the service was not considered as beginning at once from the moment of the contract.(m)

§ 217. Complete execution of both sides will unquestionably satisfy the Statute of Frauds.(n) Though the contract so performed was a sale of land subject to redemption.(o) Where a contract, invalid under the present clause, was dependent for its validity upon its confirmation by minors on reaching majority, such affirmance must be shown to establish it as an executed contract.(p) In a Massachusetts decision, it was said that a contract performed on both sides is taken out of the year clause, thus the suit was for the value of work and labor, and the contract proved was that the one party was to labor and the other to board, educate, etc., the former, and that both these stipulations had been carried out.(q) In an analogous case in Indiana, the pleadings set up a verbal contract by which, in consideration that they, the defendants, would board and care for one Mary Gilmore during her life, and attend to all her proper wants, she was to convey certain lands to the defen-

Complete
execution
of both
sides.

(i) *Atwood v. Fox*, 30 Mo. 499; see 722; *Bennett v. Matson*, 41 Ill. 332; *Holloway v. Hampton*, 4 B. Mon. 416. *Pierce v. Paine*, 28 Vt. 37; *Emery v.*

(j) *Chittington v. Fowler*, 2 Root, 387; see, also, *Burdon v. Barkus*, 4 De G. F. & J. 47. *Smith*, 46 N. H. 151; *Marcy v. Marcy*, 9 Allen, 8; see *King v. Welcome*, 5 Gray, 42; *Broadwell v. Getman*, 2

(k) *McCarger v. Rood*, 47 Cal. 141.

(l) *Burnett v. Blackmar*, 43 Ga. 576.

(m) *Birdsall v. Birdsall*, 52 Wis. 208.

(n) *Bracegirdle v. Heald*, 1 B. & A.

(o) *Bennett v. Matson*, 41 Ill. 332.

(p) *Simonds v. Catlin*, 2 Cai. 61.

(q) *Stone v. Dennison*, 13 Pick. 4.

dant, Lavisa Melton, or devise the same to her by will, and averring that the said Mary Gilmore had put them in possession of said lands under said contract; that they had boarded, cared for, and attended to the said Mary Gilmore in a suitable manner, from that time until the time of her death, a period of near six years. Wherefore they averred that the said Lavisa was the owner of said lands in her own right. Melton and his wife went into possession of the land, and Mrs. Gilmore made a will afterwards, devising Mrs. Melton the land. The court said: It has been decided by this court, and we think correctly, that a contract such as that set up in the second paragraph of the answer is not within the Statute of Frauds, and may be specifically enforced by appropriate proceedings.^(r) A different view from that taken in the above cases will be found in a case in the Common Pleas of Upper Canada. The court held the Statute of Frauds to apply, and said: "In the case before us, the goods were bought, and the purchase-money paid or secured to be paid by notes given at the same time; so the mere dealing of sale and purchase was completed. The action is brought on a verbal bargain, which is to be in force for five years, that if the goods became defective, the plaintiff should have the right to return them, and defendant should be bound to pay back the purchase-money. Now was this contract one under which all that was done or to be done, was done within the year? The learned judge considered that the plaintiff's paying the money and giving the notes was a completion of the contract on his part; but, before he could call on the defendant to perform his part of the bargain, the plaintiff had, on finding the goods defective, to return them to the defendant, who then, and not till then, was to pay the money. There was certainly something to be done, and a very important something on the plaintiff's part before he could demand his money. Any time within five years the plaintiff might return the goods if defective; it would only be on his doing this that the defendant's liability would arise. This seems certainly a case in which each party had to do something. In whatever aspect it is viewed, I

(r) *Mauck v. Melton*, 64 Ind. 415, citing cases.

cannot regard it as other than a bargain of this kind: 'If you within five years return the goods now sold to you, I will buy them back, and repay you the price.' The plaintiff, on the happening of an event (*viz.*, the goods being defective) at any time within five years, has to do an act (*viz.*, to return the goods), and the defendant is then to pay back the original price. It is remarkable that I have been able to find no case in which the facts resemble those before us."^(s)

It may be said in conclusion that this clause of the Statute of Frauds has been half repealed by the decision.^(t)

^(s) Nicholls *v.* Nordheimer, 22 U. C. C. P. 52.

^(t) See Wells *v.* Horton, 4 Bing. 40; 12 Moo., 182; 2 C. & P., 386.

CHAPTER IX.

CONTRACTS RELATING TO CHATTELS.

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| <p>§ 218. The 17th section generally and its phraseology.</p> <p>§ 219. The Louisiana, the Scotch, and the Lower Canada law.</p> <p>§ 220. Contract for amounts within the exception.</p> <p>§ 221. Chattels clause does not prevail in every state.</p> <p>§ 222. General examples of the rule of the chapter; examples of gifts.</p> <p>§ 223. Partnership contracts.</p> <p>§ 224. Earnest, under the Statute of Frauds and at common law.</p> <p>§ 225. General principles. Earnest alone is sufficient. Amount of the earnest.</p> <p>§ 226. Subsequent payment.</p> <p>§ 227. An earlier contract adopted in a later one, and a payment contemporaneous with the latter.</p> <p>§ 228. Precedent payment; and several sales, and one earnest.</p> <p>§ 229. What constitutes earnest. Examples of insufficient earnest.</p> <p>§ 230. Acts not words; other goods; promissory notes, etc.</p> <p>§ 231. Payment by a credit.</p> <p>§ 232. What are goods, wares, etc., within the Statute of Frauds generally. <i>Fructus industriales</i>.</p> <p>§ 233. Tenant's fixtures; checks given by public officers.</p> <p>§ 234. Shares of stock.</p> <p>§ 235. Assignment of chose in action.</p> <p>§ 236. Promissory notes.</p> | <p>§ 237. Patent rights. Policy of insurance.</p> <p>§ 238. Bank notes. Gold. Slaves.</p> <p>§ 239. Examples of chattels-contracts not within the Statute of Frauds.</p> <p>§ 240. Mortgage of chattels.</p> <p>§ 241. The distinction between executed and executory contracts.</p> <p>§ 242. Contracts for labor or for sale; labor generally.</p> <p>§ 243. Promise to procure goods.</p> <p>§ 244. Sale of goods not yet <i>in esse</i>; promise to procure them.</p> <p>§ 245. Contract to supply goods not yet <i>in esse</i>; cases not within the Statute.</p> <p>§ 246. Cases within the Statute.</p> <p>§ 247. Goods made on special order; general principles; cases not within the Statute.</p> <p>§ 248. Doubtful rulings.</p> <p>§ 249. The New York cases.</p> <p>§ 250. Cases within the Statute of Frauds.</p> <p>§ 251. Modern English rule.</p> <p>§ 252. "Usual business" rule."</p> <p>§ 253. Previous preparation rule; cases within the Statute.</p> <p>§ 254. General examples of cases under this rule and within the Statute of Frauds; crops; timber.</p> <p>§ 255. Late New York cases.</p> <p>§ 256. Cases under the "previous preparation rule," and not within the Statute of Frauds.</p> <p>§ 257. The preparation whether for the buyer or the seller.</p> |
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§ 218. By the terms of the 17th section of the Statute of Frauds, contracts relating to certain personal property must be proved by a writing, unless the goods are below the value of £10, or there is part delivery and acceptance had, or an earnest paid.^(a) The phraseology of the 17th section of the Statute of Frauds differs from that of the 4th; the language in the former is that no contract, unless in writing, shall be "allowed to be good." How far this difference has any effect is discussed elsewhere; see the chapter on the Validity of an Oral Promise. In Massachusetts^(b) it has been decided that in their act the words "shall be good" were not intended to make a change of meaning from the phrase in the English statute "allowed to be good."

The 17th section generally and its phraseology.

§ 219. In Louisiana contracts as to personalty above \$500 in value must be proved by at least one witness, who must be supported by corroborating circumstances.^(c) In Scotland, a sale of chattels on a term of credit, cannot be orally proved; *secus*, a market transaction, with payment on that or the next day.^(d) A contract concerning movables, or the fact of the payment or discharge of money may in Scotland be proved by parol.^(e) In the civil law of Lower Canada, as derived from France, the Ordonnance De Moulins is substantially the same as the 17th section of 29 Car. II., c. 3,^(f) and a sale of cut un-

The Louisiana, the Scotch, and the Lower Canada law.

(a) *Nichols v. Mitchell*, 30 Wis. 331; *Mechanics' Bank v. Farmers' Bank*, 60 N. Y. 48; *Dooley v. Eilbert*, 47 Mich. 615; *Alexander v. Comber*, 1 H. Bl. 20; *Bach v. Owen*, 5 T. Rep. 410 (an exchange of chattels); see 5 Waite's Act. and Def., 577, 589, 608; as to law in Missouri see *Moore v. Keep*, 5 Mo. App. 593; *Gatzweiler v. Morgner*, 51 Mo. 47.

Moore v. New Orleans, id. 314; though *semble* otherwise previously, see *Lesseps v. Wick*, 12 id. 740.

(d) *Shaw v. Wright*, Court of Sess. Cas. 5 R. 247.

(e) *Brown v. Campbell*, Bell Fol. Cas. 115; see further, *M'Adie v. M'Adie*, Sess. Cases, 4th series, vol. x. p. 744; 20 Sc. L. Rep., p. 476. See Mack. Rom. Law, 218.

(b) *Townsend v. Hargraves*, 118 Mass. 332; see Sugd. Vend. (128).

(f) *Baylis v. Ryland*, 15 Low. Can. 99; *Fry v. Richelieu*, 9 id. 411; and see Code Napoleon, 1235; see *M'Kay v. Rutherford*, 13 Jur. 21, where the Ordonnance De Moulins is set out in terms (A. D. 1566, art. 54; Anc. Lois

(c) *Turnage v. Wells*, 19 La. Ann. 135; *Brady v. McWilliams*, id. 433; *Alexander v. School Directors*, 16 id. 191; *Gardes v. Schroeder*, 17 id. 143;

derwood, being executory, cannot be proved by oral evidence.*(g)* Entrusting a horse to another to be pastured, cannot be proved orally when the value of the article is over \$50; C. C. 1233; Troplong Dépôt, n. 45; it is not a commercial transaction, and an action for the value of the horse, which had been fraudently obtained from the defendant by one claiming to be the plaintiff's agent, was dismissed.*(h)* In dealings between tradesmen and artisans in the way of their trade, 29 Car. II., c. 3, applies under Ord. 25, Geo. III., c. 2, § 2, being cases where by the French law the juges-consuls had jurisdiction, *i. e.*, commercial matters; the contract was a sale of chattels.*(i)* 29 Car. II., c. 3, is in force in Lower Canada in commercial cases, by reason of this same ordinance, which enacts that in that province "recourse, etc. etc., in proof of all facts concerning commercial matters. . . . shall be had to the rules of evidence as laid down by the laws of England."*(j)* If a sale of chattels is for over \$50, there must not only be proof that the plaintiff is a merchant, but that his business relates to the class of goods sold.*(k)* An offer by an architect to build a house over \$50 cannot be proved by parol.*(l)* But the sale of a wagon by a hotel keeper to a "cultivateur et commerçant," is a commercial act, and can be proved orally.*(m)* A contract with the government to provide stone for the public works, is a commercial matter within the terms of 25 Geo. III., c. 2.*(n)*

§ 220. There is generally an exception in the "chattels" clause of the different Statutes of Frauds, saving oral contracts relating to chattels when of trifling value. The Statute does not apply unless it appear that

Contract
for amount
within the
exception.

Franc. tom. 14, p. 203, and Ord. of 1667, art. 2; *id.* Title xx. art. 2). See, also, Act 25, Geo. III., c. 2, as to Canada, which, according to *McKay v. Rutherford*, takes the place of the above French laws.

(g) *Trudeau v. Menard*, 3 Low. Can. Jur. 52.

(h) *Johnson v. Longtin*, 24 Low Can. Jur. 292 (Cir. Ct. Montreal).

(i) *Pozer v. Meiklejohn*, Pyke, Low.

Can. 12, see for much learning on the question of jurisdiction.

(j) *Hunt v. Bruce*, Pyke (Low. Can.) 10.

(k) *Guernon v. Lacombe*, 4 Rev. Leg. 385.

(l) *Chevretils v. Les Syndics*, 2 Rev. Leg. 161.

(m) *Vandal v. Grenier*, 6 Low. Can. Report. 475.

(n) *M'Kay v. Rutherford*, 13 Jur. 21.

the consideration of the contract is above this amount.(o) Where the plaintiff claimed \$25 the court regarded the amount as a mere matter of form, and would not assume in absence of proof that the amount to be recovered under the contract was as much as \$25, so as to cause the Statute of Frauds to apply.(p) The court will presume a hundred barrels of apples to be worth more than twenty-five dollars.(q) And a promise to pay for all the mules raised from a certain jack during a certain time, at \$46 each, is within the Statute of Frauds; the amount claimed as so earned was over the statutory \$50.00.(r) In determining the value of the goods sold, it is necessary to inquire, sometimes, whether several lots are sold separately at separate prices, or together at one price.(s) In Lord Tenterden's act (9 Geo. IV., c. 14), the word used is "value" and not "price," which may not be identical in a given instance, and it has been decided that this act must be read into 29 Car. II., c. 3, and if the value of the goods is above £10, though the price might not be so much, a writing is necessary.(t)

§ 221. The "chattels" clause is not to be found in all Statutes of Frauds; the 17th section of 29 Car. II. is not in force in Virginia(u) or in Delaware;(v) verbal sales of chattels in Alabama are good;(w) and title, though acquired by a specialty, may be orally assigned.(x)

Chattels
clause does
not prevail
in every
state.

§ 222. The following are some examples of the application of the "chattels" section of the Statute of Frauds: A contract of exchange of chattels;(y) and see the cases given in the note

(o) *Armstrong v. Cushney*, 43 Barb. 341; see *Marié v. Garrison*, Report of Referee T. W. Dwight, p. 64. & Ad. 77; *Tompkins v. Haas*, 2 Pa. St. 74; *Allard v. Greasert*, 61 N. Y. 5.

(p) *Crookshank v. Burrell*, 18 Johns. 25 L. J. C. P. 257. (t) *Harman v. Reeve*, 18 C. B. 595;

58. (u) See list of statutes in the Appendix; *Chapman v. Campbell*, 13 Gratt. 109.

(q) *Bennett v. Hull*, 10 Johns. 364.

(r) *Carpenter v. Gallaway*, 73 Ind.

422.

(s) See chapters on Severability and on Acceptance; see *Champion v. Short*, 1 Campb. 53; *Carleton v. Woods*, 28 N. H. 294; *Roots v. Lord Dormer*, 4 B.

(v) *Alderdice v. Truss*, 2 Houst. 273.

(w) *Sanders v. Stokes*, 30 Ala. 436.

(x) *Acker v. Bender*, 33 Ala. 233.

(y) *Bach v. Owen*, 5 T. R. 410; see, however, *Mart. on Ld. Tent. Act*, 146.

below.(z) The case of a gift of chattels is within the present clause of the Statute of Frauds; and to constitute a valid gift of chattels there must be a deed, or writing, or delivery.(a) An oral gift without delivery may be resumed by the donor.(b) A simple writing, not under seal, has been held insufficient in Alabama.(c) A remainder in chattels must be by deed or writing, because there can be no delivery of it.(d) In Louisiana, however, a remainder or trust estate can be created by parol in chattels in favor of persons not *in esse* at the time of the gift.(e) A gift or settlement of personalty to the separate use of a married woman has been held valid in a number of cases, but it is believed that in all of these there was actual delivery and acceptance of the property.(f) In a Texas case it was said that an oral gift of a negro by a husband to his wife is good by the common law, the Spanish law, and the Texan law; but the proof is to be narrowly scrutinized.(g) *Seem* that a contract by which one trustee let the co-trustee use the trust fund in his business, and the recipient agreed to pay the former a certain amount in goods, is within the Statute of Frauds.(h)

§ 223. A partnership contract in personalty is not ordinarily within the Statute of Frauds, the possession of one partner being that of the other.(i) Where the plaintiff, interested in a shipment of goods, sold part of his interest to the defendant while the goods were at sea; the defendant was liable for his share of the loss, and the

(z) *Head v. Goodwin*, 37 Me. 186; *Carman v. Smick*, 3 Green (N. J.), 253; *Chapman v. Searle*, 3 Pick. 38; *Daniel v. Frazier*, 40 Miss. 507; *Cohrell v. Hatfield*, Stev. N. B. Dig. 691-2; *Buskirk v. Cleveland*, 41 Barb. 611; *Brown v. Slauson*, 23 Wis. 248.

(a) *Ewing v. Ewing*, 2 Leigh, 341.

(b) *Cranz v. Kroger*, 22 Ill. 80, citing cases.

(c) *Connor v. Trawick*, 37 Ala. 294.

(d) *Payne v. Lassiter*, 10 Yerg. 511; *Robinson v. Schly*, 6 Ga. 527; see *Ragsdale v. Norwood*, 38 Ala. 24.

(e) *Thompson v. Womack*, 9 La. Ann. 557.

(f) See *Walton v. Broadus*, 6 Bush, 329; *Whitten v. Jenkins*, 34 Ga. 303; *Lockhart v. Cameron*, 29 Ala. 363; *Ragsdale v. Norwood*, 38 id. 24, citing cases; *Goree v. Walthall*, 44 Ala. 161; *Machen v. Machen*, 38 Ala. 369; *Lockwood v. Cullin*, 4 Robert. 133.

(g) *Bradshaw v. Mayfield*, 18 Tex. 25.

(h) *Foote v. Emerson*, 10 Vt. 342.

(i) *Buckner v. Ries*, 34 Mo. 357; see *Lewin v. Stewart*, 10 How. Pr. 509.

Statute of Frauds does not apply, as it was a sale of profit or loss and not a sale of goods.(j) , So an agreement that if the plaintiff would assist in bringing certain hogs to market he should share in the profits.(k) Where a partner sold and delivered goods to his firm, which soon after dissolved, when it was agreed by parol that the partner should take back his goods, this was held to be a mere rescission and not a resale requiring a memorandum.(l)

§ 224. Earnest or part payment will, under the terms of the 17th section, take a case out of the Statute of Frauds.(m) As to the effect of part payment in cases not included within the Statute of Frauds, see below.(n) Bracton, under the title "De acquirendo rerum dominio, lib. 2, cap. 27, Twiss's ed., p. 489, writes as follows: *Emptio et venditio contrahitur cum de pretio convenerit inter contrahentes; dum tamen a venditore arrarum nomine aliquid receptum fuerit; Quia quod arrarum nomine datum est argumentum est emptionis et venditionis contractæ. Et si scriptura intervenire debeat non erit perfecta emptio et venditio nisi cum fuerit partibus traditio et absoluta et cum arræ non intervenierunt vel scriptura nec traditio fuerit subsequuta locus erit pœnitentiæ et impune recedere possunt partes contrahentes a contractu, sed si pretium solutum fuerit vel ejus pars et traditio subsequuta perfecta erit emptio et venditio; nec poterit postea aliquis contrahentum a contractu resilire prætextu pretii non soluti in parte vel in toto, sed agere poterit venditor ad recuperandum id quod de pretio defuerit per actionem competentem sed non ad ipsam rehabendam.*(o) Without going further into that interesting question

Earnest under the Statute of Frauds and at common law.

(j) Coleman v. Eyre, 45 N. Y. (6 Hand) 41; 1 Sween., 476.

(k) Kelsey v. Henry, 48 Ind. 37.

(l) Dickinson v. Dickinson, 29 Conn. 602.

(m) Lord Pengall v. Ross, 2 Eq. Cas. Ab. 46; Alexander v. Comber, 1 H. Bl. 20; Furniss v. Sawers, 3 U. C. Q. B. 77; Swigart v. McGee, 19 Ark. 473; White v. Allen, 9 Ind. 561; Sutton v. Sears, 10 Ind. 224; Sherry v. Picken, id. 376; Cook v. Anderson, 20 id. 17; Baker v. Farnborough, 43 id. 243;

Dole v. Stimpson, 21 Pick. 384; Denison v. Carnahan, 1 E. D. Smith, 146; Bank of Rochester v. Jones, 4 Comst. 506; Blanchard v. Trim, 38 N. Y. 227; O'Neill v. The R. R., 60 N. Y. 138; 3 Th. & C. 403; Marcus v. Barnard, 4 Rob. Sup. Ct. 219; Richardson v. Squires, 37 Vt. 640.

(n) Organ v. Stewart, 1 Hun, 411; 15 Sick. 418; Sigerson v. Kahmann, 39 Mo. 206; Neil v. Cheves, 1 Bail. 537.

(o) Which is given in Twiss's edition as follows: "But a purchase and

as to the necessity of earnest or delivery to perfect at common law a sale of chattels, the statement in a North Carolina decision may be quoted, which is to the effect that at common law earnest binds the seller, but that apart from the Statute of Frauds neither delivery nor earnest is necessary to enable the seller to recover damages against the buyer who refuses to take.(p)

§ 225. The payment and acceptance of the price of a vessel is sufficient to complete the sale between the seller and purchaser, without any bill of sale or other written instrument;(q) and earnest satisfies the Statute of Frauds, even though the parties intended to make a writing.(r) Payment of earnest can be proved by parol, and the contract is then taken out of the Statute of Frauds; this, though a receipt for the money was

sale is contracted, when the price has been agreed upon between the parties contracting, provided that something has been received by the vendor in the name of earnest, for what is received in the name of earnest is an argument of a contract for purchase and sale. And if a writing ought to intervene, the purchase and sale will not be perfect, except when it shall be delivered to the parties and completed. And when earnest money has not intervened, nor a writing, and delivery has not followed, there will be a place for repentance, and the contracting parties may with impunity recede from the contract. But if the price has been paid, or a part of it, and delivery has followed, the purchase and sale will be complete, nor can any of the contracting parties recede from the contract, under the pretext of the price not having been paid in part or in whole. But the seller may bring an action to recover that which is wanting of the price by a suitable action, but not to ratify the contract itself."

"Ad ipsam rehabendam" is not cor-

rectly translated by the phrase "to ratify the contract itself;" it should be "to get back the thing itself." *i. e.*, the thing sold "*rem venditam.*"

(p) *Hurlbut v. Simpson*, 3 Ired. 236; see *Story on Cont.*, § 1006; *Ross's Ven.*, p. *17; *Rosc. N. P. Evid.* (12th ed.), 452, 461; *Chitt. Contr.* (11th Am. ed.), 565, n. (y), as to the history of the law of earnest and the effect of the latter in passing the title to chattels.

(q) *Metcalf v. Taylor*, 36 Me. 33.

(r) *White v. Allen*, 9 Ind. 561. In *Allingham v. O'Mahoney*, 1 Pug. (N. B.) 327, it was said that where a vendee of the machinery of a mill, part of which was known to be under ground, paid earnest, the sale is perfect, notwithstanding the Statute of Frauds, though the vendor afterwards signed a writing, guaranteeing that there was certain machinery under the ground, and reciting the original agreement. The seller went to the mill and delivered a piece of the machinery to the defendant, who, however, insisted that all should be brought to the surface; even if the written memorandum was the contract, this tender was sufficient.

given which set out the contract but misdescribed the buyer.(s) But it is otherwise when the earnest itself was to be by a credit to be given in writing on an existing debt due by the seller to the buyer of the goods;(t) and where there is an earnest there need be no delivery of the goods.(u) Payment under the Statute of Frauds may be made to an agent as well as to the principal, but this agency cannot be shown by the invalid parol agreement, but must be by other authority even though parol;(v) a half-penny earnest is sufficient.(w) Where an auction sale required a certain deposit, a payment of a less sum, if accepted by the auctioneer, will be good earnest.(x) Waiver of his right to call for a deposit of money, does not estop the defendant to say that there was no part payment.(y)

§ 226. Earnest or part payment may be subsequent to the contract itself.(z) In New York the time of pay- Subsequent
ment, however, must be that of the agreement.(a) payment.

In a Massachusetts decision, passing upon New York law, it was said that the payment is not restricted to the precise time of the verbal contract; but this may be understood of a later contract adopting a previous one; an exception to the strict rule as will be presently seen.(b) The question as to when in New York the earnest must be paid, was raised in a case in the Court of Appeals, but was not decided.(c) Money borrowed by the seller of the buyer, and stipulated to go as part of the price of goods to be sold, is not a sufficient earnest as paid at the time under the New York rule.(d) The same day is soon enough.(e) The day after a verbal sale of chattels within the Statute of Frauds, the plaintiff, the seller, went to the defendant, and referred to the contract, and saying that in order

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| (s) <i>Alexander v. Moore</i> , 19 Mo. 143. | <i>Super</i> , 122; <i>Morse v. Chisholm</i> , 7 |
| (t) <i>Ely v. Ormsby</i> , 12 Barb. 570. | U. C. C. P. 133. |
| (u) <i>Franklin v. Long</i> , 7 G. & J. 407; | (a) <i>Chapin v. Potter</i> , 1 Hilt. 368; |
| <i>Bach v. Owen</i> , 5 T. R. 409. | <i>Sprague v. Blake</i> , 20 Wend. 63. |
| (v) <i>Hawley v. Keeler</i> , 53 N. Y. 119. | (b) <i>Thompson v. Alger</i> , 12 Mete. |
| (w) <i>Bach v. Owen</i> , 5 T. R. 410. | 435. |
| (x) <i>Hanson v. Roberdeau, Peake</i> , | (c) <i>Hawley v. Keeler</i> , 53 N. Y. 119. |
| 120. | (d) <i>Mattice v. Allen</i> , 33 Barb. 543; |
| (y) <i>Baltzen v. Nicholay</i> , 53 N. Y. | 3 Abb. App. Dec., 248; see <i>Ceas v.</i> |
| 467. | <i>Bramley</i> , 18 Hun, 189 <i>infra</i> . |
| (z) <i>Napier v. French</i> , 40 N. Y. | (e) <i>Brabin v. Hyde</i> , 30 Barb. 265. |

that there should be no backing out, requested a part payment which was made; it was held that the Statute of Frauds was satisfied, the contract being considered as then made for the first time, so that the part payment was at the time as required by the New York statute.^(f)

§ 227. This exception has been stated as follows: (1) "Where a contract of sale has been made good at common law, but void under the Statute of Frauds, and the parties subsequently meet, and *for the express purpose of then complying with the statute, and making the contract valid*, a payment is made by the purchaser upon the contract, at the request of the seller, such payment is made at the time of making the contract within the meaning of the Statute;" and (2) That where, in case of such a void contract, the parties subsequently come together, and substantially *restate, reaffirm, or renew its terms*, so as then and there by the meeting of their minds to *make a contract*, and then payment is made upon the contract, the statute is complied with." It was held that this case (*Hunter v. Wetsell*) was not saved under either of these propositions from the effect of the statute.^(g) In the two cases just cited, the payment was made on account of the previous contract ("towards the hops;" "on that hay"), but the latter was not restated or then for the first determined on, and the earnest was held to be insufficient.^(h) Where the buyer sued to recover back his part payment, judgment by way of counter claim was given in favor of the sellers for the unpaid balance of the price, on the ground that, though the original sale was within the Statute of Frauds, yet that when the time of payment came, the parties met and agreed that the buyer should give a note to the seller, which should be collected and credited to the price, and that the buyer should put other merchandise into the hands of the seller to sell on commission, and from the proceeds pay another part of the

(f) *Bissell v. Balcom*, 39 N. Y. 281 (12 Tiff.); 40 Barb., 98. adopted; *Hallenbeck v. Cochran*, 20 Hun, 417.

(g) *Hunter v. Wetsell*, 57 N. Y. 377, giving a statement of the manner in which the New York statute was distinguished as a case where the reference to the previous contract was distinct.

price; and this was done, and the buyer accepted a draft drawn on him by the sellers on goods consigned by the buyer to the sellers. The court, therefore, held that this adoption of the old void contract in the new contract, which was not within the Statute of Frauds, was good.⁽ⁱ⁾ In a case in 52 Barbour, the exception we are considering was apparently extended, and the court said that part payment, as well as the memorandum, might be made at any time before the time for the consummation of the contract; that when the parties meet and make and receive a part payment on account of a previous invalid parol contract, this latter is to be deemed the time of making the agreement within the meaning of the New York statute.^(j) The rule in Wisconsin also is, that to make the subsequent part payment good, there must be a distinct reference by the parties to the previous agreement.^(k) The question whether the earnest is paid at the time is one for the jury.^(l)

§ 228. The earnest may be precedent as well as subsequent. Thus, where A., in the employment of B., agrees to accept as compensation for services past and future certain specified personal property, and if, in fulfilment, A. completes the services, and B. orally transfers the goods without delivery, the services are a payment to satisfy the Statute of Frauds.^(m) And where the contract was to purchase at the buyer's option, and part of the goods were to pass at once when delivered, the earnest was applied as payment on this account.⁽ⁿ⁾ It is sometimes a question how far several sales of goods may be regarded as entire so as to make a part payment on one sale avail as earnest to take the others out of the Statute of Frauds. Thus,

Precedent payment; and several sales and one earnest.

(i) *Allis v. Read*, 45 N. Y. 147.

(j) *Webster v. Zielly*, 52 Barb. 482, denying *Bissell v. Balcom*, citing *Thompson v. Alger* and *McKnight v. Dunlop*, and see *Thompson v. Alger*, 12 Metc. 435, passing on a New York contract, and taking much this view.

(k) *Bates v. Cheseboro*, 32 Wis. 594; see *Pike v. Vaughn*, 39 Wis. 506. An

agreement to make a part payment by paying a debt of the sellers afterwards fulfilled is insufficient; *Paine v. Fulton*, 34 Wis. 85.

(l) *Mace v. Sage*, 8 N. Y. Week. Dig. 512 (S. C. N. Y.).

(m) *Howe v. Jones*, 57 Iowa, 130.

(n) *Brown v. Hale*, 5 Lans. 177.

where a sale of several lots of goods belonging to different owners is made by a part owner acting as agent for all, and though the suit should be brought as upon separate sales, yet a payment as earnest to the agent was held to enure ratably to all.(o) Where the defendant sold and delivered two lots of wool to the plaintiff, who refused to pay, because a certain third lot was not delivered, and subsequently a verbal agreement was made including this lot, and the plaintiff paid the price of the first two lots as part payment of the whole, it was held that he could recover the third lot, the payment being a good earnest as to all three.(p) Where a contract was made for the sale of ten cows, and the seller named the price of two others, and gave the buyer the refusal of these, twenty dollars was paid on account of the contract, and before the parties separated it was agreed that the two should be counted in, the payment was good earnest for all twelve, though afterwards *semble* applied by both parties to the ten, the Statute of Frauds being satisfied, the after application did not undo this effect.(q) Where, however, under a written sale of goods all but a small part are delivered and accepted, and the parties by a new oral contract agreed that the seller shall deliver the residue and whatever more of the same articles he has on hand, and that the vendee will pay a higher price for the whole than at the rate given in the written contract, the waiver by the buyer to have the rest of the goods sold by the writing delivered is no part payment or part performance to take the oral contract out of the Statute of Frauds.(r)

§ 229. What constitutes earnest is another question for consideration. It must be a real payment, and the drawing of a shilling by the buyer across the seller's palm, and a return of the shilling by the buyer into his pocket, though a former North of England custom, is not a fulfilment of the Statute of Frauds.(s)

What constitutes earnest; example of insufficient earnest.

(o) *Burhans v. Corey*, 17 Mich. 286.

(r) *Bailey v. Epperly*, 2 Ind. (Cart.)

(p) *Organ v. Stewart*, 60 N. Y. 418; 86.

1 Hun, 417.

(s) *Blenkinsop v. Clayton*, 7 Taunt.

(q) *Brown v. Hall*, 5 Lans. 179.

598.

Money left with a third person to be paid as a forfeiture for non-performance is not earnest.(t)

§ 230. There must be acts and not mere words;(u) an offer to pay is not enough.(v) But it has been held recently in New York that information of facts which affect the value of stocks ("a point") is a sufficient earnest to satisfy the Statute.(w) An earnest may be in the shape of other goods; these being the consideration of those in suit.(x) Where the buyer of a boiler, which was delivered and accepted, promised to pay on order other chattels (lumber), the latter obligation was not within the Statute of Frauds, and no writing or delivery and acceptance of the latter was necessary. *Semble* that it was not a sale of the lumber, and that if it was, the delivery of the boiler was the earnest.(y) A delivery of goods is a *payment* under 6 Geo. IV., c. 16, sec. 82, protecting payments made under certain circumstances by a bankrupt.(z) Delivery of goods is a good payment under Lord Tenterden's act requiring a payment or a written promise to pay a debt barred by the statute of limitations.(a) Where, however, the goods which are claimed to be earnest are not themselves delivered and accepted in such a manner as would satisfy the Statute of Frauds if they were in suit, they will not be a good earnest; the court saying:(b) To constitute a payment as earnest, or a part payment within the meaning of the Statute of Frauds, there must be an actual transfer or delivery of the thing or the money agreed to be given as earnest or part payment. The Statute requires it to be paid at the time of the contract; how, then, can a delivery of the thing afterwards, without acceptance, operate to take the principal contract out of the Statute of Frauds; to allow the parties to agree, by parol,

Acts not words;
other goods;
promissory notes, etc.

(t) *Noakes v. Morey*, 30 Ind. 103; (x) *Woodburn v. Cogdal*, 39 Mo. 227.
Howe v. Hayward, 108 Mass. 54. (y) *Woodford v. Patterson*, 32 Barb.

(u) *Ely v. Ormsby*, 12 Barb. 570; 630, distinguishing *Shindler v. Houston*
Brabin v. Hyde, 30 Barb. 265; *Brand* as a case of mere words.

v. Brand, 49 Barb. 348; *Mattice v.* (z) *Cannan v. Wood*, 2 M. & W. 468.
Allen, 3 Abb. App. Dec. 248. (a) *Hooper v. Stephens*, 4 A. & Ell.

(v) *Bowers v. Anderson*, 49 Ga. 145. 71.

(w) *White v. Drew*, 56 How. Pr. 58, (b) *Walrath v. Ingles*, 64 Barb. 275.
N. Y. S. C.

upon a mode of payment to be completed afterwards, would let in the very mischief which the Statute intended to avoid. An agreement, however, to sell one article, and to take another in part payment of it, is not affected by delivery of the first article as part payment, so as to sustain suit by the party delivering or paying.^(c) A promissory note of a third person, taken as payment, may be earnest.^(d) The weight of authority is against treating a promissory note as being, under ordinary circumstances, a good earnest.^(e) In a New York

(c) Chapin v. Potter, 1 Hilt, 366, Daly, J., diss. See Teed v. Teed, 44 Barb. 96.

(d) Combs v. Bateman, 10 Barb. 573. See Ames, Cases on Bills, ii. 573 (n).

(e) Id.; Wylie v. Kelly, 41 Barb. 590; Ireland v. Johnson, 28 How. Pr. 465; 18 Abb. Pr. 395; Indem. Com. Law (Benn. ed.), p. 88, n. 5, citing Griffiths v. Owen; see, however, Griffiths v. Owen, 13 M. & W. 58, 64; Chitt. Con. (11th Am. ed.), 865; Pars. Notes, ii. 206; Byles on Bills, p. *386.

In Krohn v. Bantz, 68 Ind. 278, the complaint contained the following averment, "as an earnest to bind said contract, and as part of the purchase-money of and for said hogs under said contract, plaintiff at the time and place of making said contract, executed and delivered his promissory note for one hundred dollars to defendant, due in thirty days from the day of date thereof, and drawing ten per cent. interest from date, and defendant accepted and received said note aforesaid as earnest upon said contract."

The court said: The note, we think, cannot be regarded as part payment within the meaning of the Statute. It was but the plaintiff's agreement to pay, in the future, a part of the purchase-money for the hogs, before the arrival of the time for delivery. It was no more effective for the purpose

of taking the contract out of the Statute, as part payment, than would have been the plaintiff's parol promise to do the same thing. Had the note been of such a character as to be governed by the law merchant, and, therefore, to legally operate, *prima facie*, as payment, the question presented might have been different. But it was not shown that the note was such as to be governed by the law merchant. A debtor's promissory note not governed by the law merchant, does not legally operate as payment of the debt; but it may be made so to operate by the express agreement of the parties. Maxwell v. Day, 45 Ind. 509; Alford v. Baker, 53 Ind. 279. It is not averred in the complaint that there was any express agreement between the parties that the note should be received as part payment of the hogs. But, if there had been, it would seem to be quite doubtful whether such an agreement would make the note operate as part payment within the Statute. It would be but an agreement that a promise of future payment should operate as part payment, while the Statute requires something more than words; it requires part payment, and not a promise of part payment to be received in payment. See, on this point, Brabin v. Hyde, 32 N. Y. 519; Archer v. Zeh, 5 Hill, 200; Mattice v. Allen, 3 Keyes, 492; Matthiessen, etc.,

case it was said, that where one of the conditions of a contract is complied with, and a note tendered for the price, the Statute of Frauds was satisfied.(f) Where a call was made for part-payment, and a check sent was refused, there was held to be no earnest.(g)

§ 231. An agreement that the price shall go in settlement of an existing account is not without more sufficient earnest;(h) something must be done.(i) Money borrowed by the seller of chattels from the buyer and stipulated to go as part payment for goods to be sold is not a sufficient earnest paid at the time under the Revised Statutes of New York.(j) It has been doubted in New York whether an agreement to endorse on a mortgage held by the vendee, the price of chattels sold is an earnest till endorsement.(k) And the crediting of an amount in an account is not a part payment to take a case out of the Statute of Frauds under the Revised Statutes of New York.(l) An entry in his books

Payment by
a credit.

Co. v. McMahon's Admr., 9 Vroom, 536; *Walrath v. Richie*, 5 Lans. 362; *Walker v. Nussey*, 16 M. & W. 302; *Ireland v. Johnson*, 28 How. Pr. 463. We come to the inquiry whether the note can be regarded as earnest, sufficient to bind the bargain, and are clearly of the opinion that it cannot. It was said in the case of *Howe v. Hayward*, 108 Mass. 54, that "as used in the Statute of Frauds, 'earnest' is regarded as a part payment of the price." But, conceding that it may be something distinct from part payment, it is quite clear that it must have some value. *Brown's Stat. of Frauds*, sec. 341; *Benjamin, Sales*, sec. 189, and note c. The note has no value whatever, because it had no consideration to support it, and its payment could not, therefore, have been enforced. To say that such a note has value, is but grasping at a shadow, and losing sight of the substance. The contract for the sale of the hogs not being valid,

the note given in consideration of the agreement therefor was based upon no valid consideration. That the note was void, for want of consideration, is sustained by the following authorities: *Combs v. Bateman*, 10 Barb. 573; *Hooker v. Knab*, 26 Wis. 511; see, also, the case of *Scott v. Bush*, 26 Mich. 418.

(f) *Gray v. Payne*, 16 Barb. 277.

(g) *Edgerton v. Hodge*, 31 Vt. 676.

(h) *Brabin v. Hyde*, 30 Barb. 265; *Brand v. Brand*, 49 Barb. 348; *Morton v. Johnson*, 14 N. Y. W. Dig. 378, S. C. N. Y.; *Walker v. Nussey*, 16 M. & W. 304; *Sawyer v. Ware*, 36 Ala. 681.

(i) *Mattice v. Allen*, 3 Abb. App. Dec. 248, 3 Keyes, 492, considering cases; see *Walrath v. Richie*, 5 Lans. 364; *Gibbs v. Nash*, 4 Barb. 452.

(j) *Mattice v. Allen*, 3 Abb. App. Dec. 248; 33 Barb., 543.

(k) *Ely v. Ormsby*, 12 Barb. 570.

(l) *Archer v. Zeh*, 5 Hill, 204.

by the buyer, the plaintiff, is insufficient.^(m) In a New Jersey case the following question was decided in the negative. The evidence in the cause, the request to charge, and the charge as given, present the question whether an agreement in parol by the seller to sell, and the buyer to buy goods to the value of an existing debt, and thereby satisfy and pay the debt is a valid sale within the Statute, though there be no delivery of the goods, and no receipt or voucher to be given as evidence of the discharge of the indebtedness.⁽ⁿ⁾ But *semble* that a receipt or actual credit given may be good, and in an English case it was suggested that if the agreement as to the part payment had been subsequent to and separate from the oral contract, it might be good.^(o) And *semble* even in New York an actual credit given has been thought sufficient.^(p) And in a case in Howard's Practice Reports, as an incidental point, there came up for decision the question whether an oral agreement that a debt due by the defendants to the plaintiff's brother Horace should be assumed by the plaintiff with Horace's assent as a payment of earnest in another transaction was such payment of earnest, and it was held that by the arrangement between the three the defendants' debt was extinguished, and the plaintiff's assumption of the debt, which, under the arrangement Horace charged against him, was a payment of it and not a guaranty of it within the Statute of Frauds, the payment was good earnest.^(q) There are some authorities which appear to treat the mere agreement to give a credit as a sufficient earnest.^(r) And in an Indiana case it was suggested that an agreement that the amount of a note

^(m) *Id.*; *Teed v. Teed*, 44 Barb. 96, the entry not stating that the credit was given on account of the transaction in suit.

⁽ⁿ⁾ *Matthiessen v. McMahon*, 38 N. J. L. Rep. 538, citing and considering a number of cases.

^(o) *Walker v. Nussey*, 16 M. & W. 304; and see *Dow v. Worthen*, 37 Vt. 112; *Brand v. Brand*, 49 Barb. 348;

Teed v. Teed, 44 Barb. 96; *Artcher v. Zeh*, 5 Hill, 200; *Gilman v. Hill*, 36 N. H. 311.

^(p) *Napier v. French*, 40 N. Y. Super. 122.

^(q) *Stoddard v. Graham*, 23 How. Pr. 532; see *Cotterill v. Stevens*, 10 Wis. 425; see, however, *Paine v. Fulton*, 34 Wis. 85.

^(r) *Brown v. Wade*, 42 Ia. 649.

owed by the vendor to the vendee should be part of the price, is sufficient earnest though the note was not delivered.(s)

§ 232. The next subject for consideration is what are the chattels or personal property which come within the meaning of the present clause. First it may be said that "chattels" as used in the New York Statute of Frauds is synonymous with the words "goods, wares, and merchandise" of 29 Car. II.(t) Crops or *fructus industriales* when not land within the fourth section of 29 Car. II. may be chattels within the seventeenth. As a contract to cut and deliver growing timber.(u) Or a promise by the vendee of growing timber, who has cut some, to resell the residue to the vendor.(v) In Arkansas a lien on crops cannot be created by parol, with possession given.(w) So a sale of a crop of growing potatoes to be raised by the vendee and delivered on maturity to the buyer.(x) So a sale of growing grass.(y) Under the bills of sale Act (17 and 18 Vict., c. 36, s. 1) growing crops are not "personal chattels," which in the act are defined to mean "goods, furniture, fixtures, and other articles capable of complete transfer by delivery;" growing crops are not capable of such delivery.(z) Nor are crops yet to be raised within the exception of the stamp act (23 Geo. III., c. 58, s. 1), reserving contracts for goods, wares, and merchandise;(a) growing crops are not such goods and chattels as are susceptible of manual delivery till harvested, and are consequently not within the statutes forbidding conveyances fraudulent as against creditors.(b)

What are goods, wares, etc., within the Statute of Frauds generally. *Fructus industriales.*

§ 233. An agreement that a tenant about to tear down some temporary buildings should not do so, and that the

(s) *Sloan v. Scott*, 4 West. L. Jour. 5 (Fountain Ind. C. C.); see *Webster v. Bailey*, 40 Mich. 642.

(t) *Passaic Co. v. Hoffman*, 3 Daly, 502, citing many dictionaries.

(u) *Sherry v. Picken*, 10 Ind. 376; *Edwards v. R. R.*, 54 Me. 110.

(v) *Smith v. Bryan*, 5 Md. 141.

(w) *Alexander v. Pardue*, 30 Ark. 361.

(x) *Evans v. Roberts*, 5 B. & C. 831;

see *Watts v. Friend*, 10 B. & C. 448 (the article when ready for delivery would be a personal chattel).

(y) *Crosby v. Wadsworth*, 6 East, 609.

(z) *Brantom v. Griffiths*, 2 C. P. D. 214; 36 L. T., N. S. 4.

(a) *Waddington v. Bristow*, 2 B. & P. 454.

(b) *Bernal v. Hovious*, 17 Cal. 545.

lessor should have them when the term should expire, and should remit a part of the rent, is an agreement for personalty, and within the Statute of Frauds.(c) Though *semble* an agreement as to a tenant's fixtures is not, in England, within the 17th section of the Statute of Frauds.(d) Gravel for repair of roads is "goods, wares, and merchandise" within an English statute regulating toll on canals.(e) Treasury checks (*i. e.*, checks drawn by the United States Treasurer on the United States Bank) are neither "goods, wares, nor merchandise" within the meaning of the Statute of Frauds.(f)

§ 234. Though there is conflict of decision, partly owing to a difference of phraseology in the various Statutes of Frauds, yet the weight of authority treats shares of stock as being mere choses in action, and not within the Statute of Frauds.(g) In an early case this conclusion was reached.(h) Shares in a lead mine worked on the cost-book principle are *semble* not within the Statute of Frauds.(i) Railway shares are not chattels, goods, etc., and an agreement concerning them must have an agreement stamp, as the exception to 55 Geo. III., c. 138, sched. pt. 3, tit. "agreement," covering goods, etc., does not apply to them.(j) Shares in a proposed railway are not within the Statute of Frauds.(k)

(c) *Lawrence v. Woods*, 4 Bosw. 362; so a contract as to improvement on lands; *Sutton v. Sears*, 10 Ind. 224.

(d) *Hallen v. Runder*, 3 Tyr. 965; 1 Cr. M. & R. 274.

(e) *Coulton v. Ambler*, 13 M. & W. 416.

(f) *Beers v. Crowell*, Dudley, 29.

(g) *King v. Capper*, 5 Price, 262; *Heseltine v. Siggers*, 18 L. J. N. S. Exch. 166; 1 Exch. 856; *Hibblewhite v. McMorine*, 6 M. & W. 214; see 7 South Law Rev. 434; *Moraw. Priv. Corp.*, § 343; *Ang. & Am. Corp.*, 11th ed., § 563; *Dos Passos on Stock Broker*, pp. 107, 587, 758; *Biddle on Stock Br.*, Index "chattels;" *Lindl. Part. (Ew. ed.)* pp.*661, 673-4; *Pierce on R. R.* 110; see, also, *Ashworth v. Munn*, 15

Ch. D. 368; *Worth v. Ashe Co.*, 82 N. Car. 420; *Baker v. Wasson*, 53 Tex. 151.

(h) *Colt v. Netterville*, 2 P. Wms. 306. *Semble* that a share of stock is not goods, wares, etc., within the Statute of Frauds, a point on which in *Pickering v. Appleby*, Com. Rep. 354, the judges of England were six against six. See *Crull v. Dodson*, Sel. Ca. Temp. King (Fol.) 41.

(i) *Walker v. Bartlett*, 18 C. B. 845; 2 Jur. N. S., 645; 17 C. B., 446; 2 Jur. N. S., 261.

(j) *Knight v. Barber*, 16 M. & W. 69; 3 Car. & K. N. P., 335; see *Amer. notes*.

(k) *Tempest v. Kilner*, 3 C. B. 253.

nor those an actual one.(l) Certificates of railway stock are not "goods" within 5 and 6 Vict., c. 39, giving factors and agents power to bind the goods deposited with them with the lien for advances made thereon.(m) Shares in a joint-stock bank are not chattels within the 17th section, but choses in action incapable of delivery and decisions on 6 Geo. IV., c. 16, sec. 72 (bankrupt act), are not applicable under the Statute of Frauds.(n) As has just been seen, shares of a corporation not yet in existence are not within the Statute of Frauds, and the point that the shares were yet to be issued, and were not *in esse* when the contract was made, has been in some cases a good deal rested upon.(o) A contract to buy shares of stock is not within the Statute of Frauds.(p) There are several cases in which either a doubt or no opinion has been expressed as to whether shares of stock are within the Statute of Frauds or not,(q) and in one English case, the 17th section of the Statute was made to apply, and it was held that an oral contract of sale of South Sea stock is invalid if no earnest is paid, such agreements being *nuda pacta*;(r) and shares of stock are within a bankrupt's order and disposition within the meaning of the bankrupt act, and are not choses in action within the meaning of the exception thereto.(s) There is, however, no inconsiderable reason for holding that the American rule differs from the English, and that contracts relating to stock are in this country within the Statute of Frauds.(t) The Massachusetts rule is well settled.(u) In *Tisdale v. Harris*, it was

(l) *Duncuft v. Albrecht*, 12 Sim. 198, see cases cited in note thereto; *Bowlby v. Bell*, 3 C. B. 291.

(m) *Freeman v. Appleyard*, 32 L. J. Exch. 175.

(n) *Humble v. Mitchell*, 11 A. & Ell. 205.

(o) *Gadsden v. Lance*, 1 McMull. Eq. 87; *Green v. Brookins*, 23 Mich. 52.

(p) *Washburn v. Franklin*, 28 Barb. 27.

(q) See *Pawle v. Gunn*, 4 Bingh. N. C. 448; *Pickering v. Appleby*, 1 Comyn. 354, the court divided in opinion; the shares were in a mining company;

Green v. Brookins, 23 Mich. 52; *Vaupeil v. Woodward*, 2 Sandf. Ch. 143.

(r) *Crull v. Dodson*, Sel. Ca. Temp. King (folio), 41; 5 Vin. Abr. 524, pl. 46, n.

(s) *Jackson (Re)*; *Union Bank (Ex parte)* L. R. 12 Eq. 357.

(t) *Tisdale v. Harris*, 20 Pick. 13; *Colvin v. Williams*, 3 Harr. & J. 42 (bank stock); *North v. Forest*, 15 Conn. 404; *Gadsden v. Lance*, 1 McMull. Eq. (So. Car.) 90; *Fine v. Hornby*, 2 Mo. App. 64.

(u) *Boardman v. Cutter*, 128 Mass. 390, citing *Tisdale v. Harris* and *Bald-*

said that the fact that there could be no part delivery of the stock, did not take the case out of the Statute of Frauds, and was an additional reason for requiring a writing.(v) In New York the law seems to be the same; and United States bonds have been held to be within the Statute of Frauds.(w) Where one of a firm promised plaintiffs if they would take certain railroad securities for a debt owed them by the firm, he, the defendant, would thereafter, etc., buy the securities of the plaintiff at the price of the debt for which they were taken, the promise was held to be invalid within the chattels clause of the Statute of Frauds.(x) The phrase "things in action," used in the New York statute (R. S. 136, § 32), is a reason for treating the law as more comprehensive than 29 Car. II.(y) The rule in Maine also treats shares of stock as within the Statute of Frauds, the Statute of that state using the words "goods and merchandise."(z) Contract for mining stock must under the law of California be in writing.(a) In Missouri shares of stock are within the Statute of Frauds.(b) A sale of an interest in a railroad is within the Statute.(c) In Florida shares of stock are within the Statute of Frauds, the words used being "personal property."(d)

win v. Williams, 3 Metc. 365, and referring to *Somerby v. Bunting*, 118 Mass. 279, as showing that there is conflict of decision on the point. In *Somerby v. Bunting*, the court said: "It was held by the Court of Chancery in England, before the American Revolution, that shares in a corporation were goods; wares and merchandise within the Statute of Frauds; *Mussel v. Cooke*, Pre. Ch. 533; *Crull v. Dodson*, Sel. Cas. in Ch. 41. And it has been held by this court that such shares, and even promissory notes are full within the Statute; *Tisdale v. Harris*, 20 Pick. 9; *Baldwin v. Williams*, 3 Met. 365. But the modern decisions in England are the other way, and the decisions in other states are at variance; *Brown on St. Frauds*, §§ 296, 298; 6 Chit. Con. (11th Am. ed.), 541, note."

(v) 20 Pick., 13.

(w) *Brownson v. Chapman*, 63 N. Y. 625; *Sherwood v. Tradesman's N. Bk.*, 16 N. Y. Week. Dig. 522, N. Y. S. C.; see on the subject generally, *Passaic Man. Co. v. Hoffman*, 3 Daly, 495; but see *Genin v. Isaacson*, 6 N. Y. Leg. Obs. 215.

(x) *Hagar v. King*, 38 Barb. 205.

(y) *Tomlinson v. Miller*, 7 Abb. Pr. N. S. 368.

(z) *Pray v. Mitchell*, 60 Me. 434, citing several cases, and denying *Humble v. Mitchell*.

(a) *Mayer v. Child*, 47 Cal. 144.

(b) *Fine v. Hornby*, 2 Mo. App. 64.

(c) *Kauffman v. Harstock*, 31 Ia. 473.

(d) *Southern Life Ins. Co. v. Cole*, 4 Flor. 378; see *Vawter v. Griffin*, 40 Ind. 601.

§ 235. The law as to whether the assignment of a chose in action must be in writing is greatly at variance, and while it is not possible to give the subject other than a passing notice, a few cases which have a more or less direct bearing upon the Statute of Frauds may be of interest. In Maryland by statute an assignee of a chose in action must have a written assignment if he is to sue in his own name.^(e) In New York such an assignment must be evidenced by a writing, the delivery of the evidence of the debt, or of part thereof, or by a part payment.^(f) As early as a case in 12 Coke a recognizance, though only a chose in action, was treated as forfeitable as "goods" under statute of 29 Elizabeth.^(g) A demand for a balance due on an account stated is a "chose in action," and within the New York Statute of Frauds.^(h) So an oral executory agreement for the sale of a judgment above \$50.⁽ⁱ⁾ A judgment in Louisiana is a chattel so as to require written evidence of its sale in furtherance of certain proceedings had in settlement of an insolvent estate.^(j) The purchase of the right and title of a person in a certain contract of work is of a *chose in action*, and within the Statute.^(k) So a money interest in the proceeds of sale of certain goods.^(l) An account held against a third person being transferable by Georgia law is within the Statute of Frauds of that state.^(m) There need not be a writing if there is delivery of the evidence of the claim.⁽ⁿ⁾ So in Maine.^(o) An oral assignment of a claim for the price of goods sold and delivered is not void by the Statute of Frauds; so it has been held in New York.^(p) In New Hampshire it has been said that under the authority of *Whittemore v. Gibbs*, 24 N. H. 484, the contract for an assignment of a judgment would not

Assign-
ment of
chose in
action.

(e) *Union Bank v. Tillard*, 26 Md. 451.

(f) *Archer v. Zeh*, 5 Hill, 204.

(g) *Ford's Case*, 12 Coke, 2; see note.

(h) *Armstrong v. Cushney*, 43 Barb. 341.

(i) *People v. Beebe*, 1 Barb. 379.

(j) *Ayles v. Hawley*, 9 La. Ann. 362.

(k) *Talmadge v. Spofford*, 41 N. Y. Super. 431.

(l) *Von Keller v. Schulting*, 50 N. Y. 115.

(m) *Walker v. Supple*, 54 Ga. 179.

(n) *Prescott v. Hull*, 17 Johns. 292; *Briggs v. Dow*, 19 id. 96.

(o) *Littlefield v. Smith*, 17 Me. 328; *Porter v. Bullard*, 26 id. 451.

(p) *Kessel v. Albetis*, 56 Barb. 367.

come within the Statute of Frauds; such judgment not being goods, wares, and merchandise under a just construction of that Statute, according to the import of that decision.(q) In Maryland it has been held that a sum of money levied in county levies can be verbally assigned by the person in whose favor it has been levied.(r) Where the seller of goods delivered and paid for agrees, that if certain duties on the goods are rebated, he will hand over the amount allowed by the government to the buyer, the Statute of Frauds does not apply; this is not the sale of a claim or chose in action, but an item of contract taken out of the Statute by performance.(s)

§ 236. Promissory notes are not within the Statute of Frauds.(t) In New York, a promissory note was said to be a chose in action, and not subject to levy as a chattel.(u) In an Alabama case, it was said that while, if anything remains to be done to a chattel sold, the contract is executory, this does not apply to the sale of a particular promissory note.(v) But under the Alabama code, promissory notes cannot be orally sold if for more than \$200.(w) In Massachusetts the law is the same.(x) Bills and notes do not come within the words "in-door movables," as used in a bequest.(x¹) A promissory note is a chattel so as to give chancery in Massachusetts jurisdiction to enforce specific

(q) *Abbott v. Shepard*, 48 N. H. 17. In Massachusetts the sale of promissory notes is held to be within the Statute; *Baldwin v. Williams*, 3 Met. 367. In New York a parol agreement, wholly executory, for the sale of a judgment for a sum exceeding \$50 was held to be within the Statute of Frauds; *People v. Beebe*, 1 Barb. 379; *Hilliard on Sales*, 429.

(r) *Baden v. The State*, 1 Gill, 171.

(s) *Allen v. Aguirre*, 3 Seld. 544; 10 Barb., 74; 5 N. Y. Leg. Obs., 380.

(t) *Whittmore v. Gibbs*, 24 N. H. 488; as to how far they are within the Statute of Frauds, the Bankruptcy Act, etc., see *Ames's Cases on Bills*, ii. 707, u. *Vawter v. Griffin*, 40 Ind. 602, citing

many cases, and saying, that it is well settled in England that contracts for the sale of shares of stock, notes, checks, bonds, and evidences of value, are not within the seventeenth section of the Statute of Charles II. "Goods" is the only word used in the Indiana Statute of Frauds as to chattels; the court said that "goods" means visible things, and is not so comprehensive as personal property, but the omission of the words "wares, etc.," had no effect.

(u) *Ingalls v. Lord*, 1 Cow. 246.

(v) *Hudson v. Weir*, 29 Ala. 298.

(w) *Id.*; Code 1852, § 1551.

(x) *Baldwin v. Williams*, 3 Metc. 367.

(x¹) *Penniman v. French*, 17 Pick. 404.

delivery.(y) In Lower Canada, promissory notes, bills, etc., are chattels (effects) within C. C. B. C., art. 1235, § 4.(z)

§ 237. Speaking of a contract by which an invention and money were to be furnished and a patent procured, and the parties were to share in the profits, it was said in a Massachusetts decision, that: The words of the Statute have never yet been extended by any court beyond securities which are the subject of common sale and barter, and which have a visible and palpable form. To include in them an incorporeal right or franchise granted by the government, securing to the inventor and his assigns the exclusive right to make, use, and vend the article patented, or a share in that right, which has no separate or distinct existence at law until created by the instrument of assignment, would be unreasonably to extend the meaning and effect of words which have already been carried quite far enough.(a) The assignment of a policy of insurance as collateral security under a contract whereby the assignee was to collect the insurance money, if the goods were burnt, and apply it to his debt, does not have to be in writing; delivery is sufficient: an insurance policy is *semble* not a chattel within the Statute of Frauds, nor is the money realized by it such.(b) The sale of his salary exceeding \$50 by a United States officer, is within the New York Statute of Frauds.(c)

Patent
rights:
Policy of
insurance,
etc.

§ 238. Notes of a private bank are within the Statute.(d) And bank bills have been held to be goods to the extent of being obliged to contribute to the loss occasioned by a jettison to relieve a vessel.(e) A

Bank
notes;
gold;
slaves.

(y) Clapp v. Shepherd, 23 Pick. 228.

(z) Truteau v. Leblanc, 4 Rev. Leg. 566.

(a) Somerby v. Buntin, 118 Mass. 285, citing Chanter v. Dickinson, 6 Sc. N. R. 182; 5 M. & G. 203.

(b) Bibend v. Ins. Co., 30 Cal. 87. In Vandergrift's Appeal, 83 Pa. St. 129; it was held that, under Act of June 13, 1836 (Penna.), regulating foreign attachments, the phrase "goods and effects" does not include leaseholds of

lands and buildings on such leasehold; other sections of the act, in a different connection, speaking of "houses, buildings, and lands," and of "goods, chattels, lands, and tenements."

(c) Billings v. O'Brien, 45 How. Pr. 398; 14 Abb. Pr. N. S. 244; 4 Daly, 556.

(d) Riggs v. Magruder, 2 Cranch C. 143; but see Houghton v. Adams, 18 Barb. 548.

(e) Harris v. Moody, 30 N. Y. 266.

contract for certain bank bills for a certain sum in current money is within the Statute of Frauds.^(f) Bank bills are not “goods, wares, and merchandise,” as describing in a charter the articles which a transportation company was authorized to carry.^(g) Nor are they “goods and chattels” within the meaning of a law regulating the liability of insurers or common carriers.^(h) A sale of so much gold for a price in other legal-tender currency is within the Statute of Frauds, being for a commodity.⁽ⁱ⁾ In Oregon a contract for the sale of gold must be in writing. See as to gold contracts *infra*.^(j) Under Art. 2257 of the Civil Code of Louisiana, contracts for personal property and money contracts, not in writing, where the value is less than \$500, can be proved by parol. Over that sum, contracts relating to money, and contracts relating to chattels, must be proved by a witness and corroborating circumstances.^(k) Slaves and their services come within the “chattel” clause of the Statute of Frauds.^(l)

§ 239. Before taking up the subject of contracts for labor, which will consume the remainder of this chapter, a few examples of other contracts, which have been held to be not within the Statute of Frauds, may here be noted. Thus, where the plaintiff, an officer of court, delivered to the defendants certain articles which he had attached, and the defendants gave a signed memorandum reciting this fact, etc., the Statute of Frauds was held not to apply, even if the writing was insufficient.^(m) B. made a chattel mortgage to Clark, the plaintiff, who, failing to record it, enabled B. to sell the chattels to Duffey, the defendant, a *bona fide* purchaser without notice; Duffey promised Clark to

Examples
of chattels
contracts
not within
the Statute
of Frauds.

- (f) *Gooch v. Holmes*, 41 Me. 523. (l) *Montgomery v. Henderson*, 3 Jones. Eq. 114. By express statute in Louisiana, *Miltenberger v. Canon*, 10 Martin, 87; *Michel v. Dolliole*, 1 La. Ann. 460; *M'Guire v. Amelung*, 12 Mart. 650; *Crawford v. Puckett*, 14 La. Ann. 640; *Babcock v. Stanley*, 11 Johns. 178.
- (g) *Seward v. Allen*, 6 Wend. 355. (m) *Marion v. Faxon*, 20 Conn. 494.
- (h) *Chicago R. R. v. Thompson*, 19 Ill. 578.
- (i) *Peabody v. Speyers*, 56 N. Y. 233.
- (j) *Taylor v. Patterson*, 5 Or. 123; *Russell v. Swift*, id. 234; see *Davis v. Mason*, 3 id. 154.
- (k) *Moore v. New Orleans*, 17 La. Ann. 314.

waive his claim if he, Clark, would take up the note for the price which he, Duffey, had given B.; Clark took up this note, tendered it to Duffey, and demanded fulfilment of the latter's promise to waive his claim, and let him, Clark, have the goods; Duffey refusing, this action was brought, and the Statute of Frauds was held not to be a defence, the transaction not being a sale but the waiver of a claim.⁽ⁿ⁾ As to how far a price is essential to make a contract relating to chattels one of sale and within the Statute of Frauds, see *Marié v. Garrison*, Report of Referee, T. W. Dwight, p. 64.

§ 240. An oral mortgage, in absence of any statute requiring a writing, is good, at least between the parties.^(o) But the evidence must be clear and convincing;^(p) ^{Mortgage of chattels.} nor need there be a specialty.^(q) A verbal pledge of goods is valid under the Statute of Frauds, when the goods have been delivered and accepted; the goods were afterwards wrongfully taken from the plaintiff, the pledgee, and sold the defendant, with notice: the plaintiff could recover.^(r) Under the general statutes of Connecticut, a sale, etc., by a husband of his wife's personalty, or his interest therein, must be by a written conveyance, in which she joins, and it was held that

(n) *Clark v. Duffey*, 24 Ind. 272.

(o) *Brown v. Coats*, 56 Ala. 439; *Alabama Warehouse Co. v. Lewis*, 56 Ala. 514; *Stearns v. Safford*, 56 Ala. 544; *McKeithen v. Pratt*, 53 Ala. 119; see *Rev. Code Ala.* (§ 1565), § 2174; see, also, VII. U. S. Dig. N. S., 577 *et seq.*; *Herm. Chatt. Mort.*, 39, 296; see *Taylor v. Eckersley*, 2 Ch. Div. 302.

(p) *Shelburne v. Letsinger*, 52 Ala. 96, citing cases.

(q) *Flory v. Denny*, 7 Exch. 581; 21 L. J. Exch., 223; *Gibson v. Warden*, 14 Wall. 244. Where by a written contract certain chattels were sold to the plaintiffs by the defendant for twelve thousand dollars, and one thousand dollars as part of the price was paid by the plaintiffs for the refusal, and the plaintiffs paid later the remaining eleven thousand dollars, parol evi-

dence is admissible under the Statute of Frauds to show that the parties afterwards agreed that the plaintiffs might have one of the chattels (an engine) on trial, and that if they were not satisfied they might return it, and the defendant would deduct or refund the one thousand dollars. The suit was for the one thousand dollars, the plaintiffs having rejected the engine. The court thought the engine having been taken only on condition, that there was no sale, and, hence, that the Statute of Frauds did not apply; *White v. Knapp*, 47 Barb. 557; see, however, *Lanning v. Carpenter*, 48 N. Y. 413, in which *semble* a mortgage of chattels was thought to be within the Statute of Frauds.

(r) *Bardwell v. Roberts*, 66 Barb. 435.

this does not apply to a mere pledge of personalty.^(s) The law is not uniform on this point; in a Maryland case it was said that an oral contract for the mortgage of chattels will be enforced in equity if the Statute of Frauds does not apply.^(t) In Iowa a conditional sale of personalty must be in writing and recorded.^(u)

§ 241. A distinction was formerly taken between contracts on an executed and those on an executory consideration, and it was said that where anything remained to be done before the contract could be carried out the Statute of Frauds did not apply. Thus, an oral contract to deliver wheat at a future date was held to be valid; and it was said that the Statute^(v) only applied to executed contracts. But this is no longer law.^(w) And in the English cases which first laid down the law as it now is the earlier cases are distinguished as being

The distinction between executed and executory contracts.

^(s) *Padbury v. Gorlick*, 36 Conn. 426, citing cases. Where one Gleason brought replevin for a boat which had been attached by Drew, as the property of H., and Gleason had sold to H., who paid half the price, but who being afterwards unable to pay the rest, gave up to the plaintiff the bill of sale, the boat was left in the care of the defendant; afterwards the sale by Gleason to H. was rescinded; it was held that by the resale H. paid his debt to Gleason, and that this payment took the case out of the Statute of Frauds, and judgment was given for the plaintiff, as the contract was looked on as a mortgage, and a mortgage of chattels is not within the Statute of Frauds; *Gleason v. Drew*, 9 Greenl. 80.

^(t) *Triebert v. Burgess*, 11 Md. 464, citing *Alexander v. Ghiselin*, 5 Gill, 138, and other cases.

^(u) See *Knoulton v. Redenbaugh*, 40 Ia. 114; see *Brown v. Allen*, 35 Ia. 309; a contract to give a lien on chattels is as much within the Statute of Frauds as a sale. See *De Blois v.*

Reiss, 32 La. Ann. 586; and see *Shaw v. Wilshire*, 65 Me. 491; 2 Henn. La. Dig., 1189; VII. U. S. Dig. N. S., 577 *et seq.*; *Herman on Chattel Mortg.*, 39, 296, as to the necessity of a chattel mortgage being in writing.

^(v) *Clayton v. Andrews*, 4 Burr. 2101 (the wheat was to be threshed); and see *Towers v. Osborne*, 1 Stra. 506 (an order for a chariot).

^(w) *Atwater v. Hough*, 29 Conn. 513; *Hight v. Ripley*, 19 Me. 319; *Edwards v. Grand Trunk R. R.*, 48 Me. 380; *Newman v. Morris*, 4 Harr. & McH. 421; *Eichelberger v. McCauley*, 5 H. & J. 213; *Gilman v. Hill*, 36 N. H. 317; *Pitkin v. Noyes*, 48 N. H. 297; *Carman v. Smick*, 3 Green, N. J. 253; *Bennett v. Hull*, 10 Johns. 364; *Crookshank v. Burrell*, 18 Johns. 58; *Jackson v. Covert*, 5 Wend. 141; *Downs v. Ross*, 23 Wend. 270; *Sewall v. Fitch*, 8 Cow. 215; *Gadsden v. Lance*, 1 McMull. Eq. 87; *Ide v. Stanton*, 15 Vt. 689; *Meincke v. Falk*, 13 No. West. Rep. 545; 55 Wis., 429; see 16 Amer. Jur., 295; *Stor. Contr.* (5th ed.), p. 158, n.

rather those of contracts for labor than mere executory agreements for the sale of chattels.(x) In a case in the Upper Canadian Common Pleas it was said that a composition with creditors which does not involve a *future* assignment of goods is valid by parol.(y)

§ 242. The next subject for discussion is the difference between contracts of sale and contracts for labor, the former being within the Statute of Frauds, the latter not.(z) Thus, where the object of the contract was the services of a person employed, and not the result of his work, the employé can recover for such work, and should not sue for goods sold.(a) The question being whether a writing should be stamped or not, it was held where the memorandum showed that much work was to be done before the article referred to was ready, that at least, in absence of further evidence, it was not for the sale of a chattel, but was a contract for labor, and that a stamp was

Contracts for labor or for sale. Labor generally.

(x) *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 T. R. 16, distinguishing *Towers v. Osborne* as the case of a special order involving labor; and *Clayton v. Andrews* as one in which the wheat was to be threshed; see *Alexander v. Comber*, 1 H. Bl. 20; *Smith v. Surman*, 4 M. & R. 455; 9 B. & C., 561; *Ellison v. Brigham*, 38 Vt. 66; *Finney v. Apgar*, 2 Vroom, 268. As will be seen later, the fact that preparation of the chattels is necessary in order to complete their sale has, in many cases, been made a reason for making an exception to the Statute of Frauds; and in others the point relied upon has been the fact that the contract was not an ordinary sale, but the fulfilment of a special order; therefore the threshing of the wheat in *Clayton v. Andrews*, and the execution of the special order for a certain kind of chariot, in *Towers v. Osborne*, have been given as the reason for following these authorities in this particular re-

spect, while the theory they lay down as to executed and executory contracts has been denied; see *Crookshank v. Burrell*, 18 Johns. 58; *Groves v. Buck*, 3 M. & S. 179; *Garbutt v. Watson*, 5 B. & Ald. 613; *Pitkin v. Noyes*, 48 N. H. 297; *Courtright v. Stewart*, 19 Barb. 455; *Cason v. Cheely*, 6 Ga. 556; *Ferren v. O'Hara*, 62 Barb. 527; *Mead v. Case*, 33 Barb. 204; *Allen v. Jarvis*, 20 Conn. 53; *Partridge v. Wilsey*, 8 Ia. 461; *Jackson v. Covert*, 5 Wend. 141.

(y) *Brunskill v. Metcalf*, 2 U. C. C. P. 450.

(z) See on this subject *Pars. Cont.*, iii. p. 54; 3 *Amer. L. Rev.*, 542; *Edw. Bailm.*, 2d ed., § 413. In Scotland the rule is otherwise, and *semble* the Act Aug. 29, 1681, applies; *Napier v. Dick*, Hume, 388; *Paterson v. Edrington*, Sess. Cas., 8 S. 931; 5 *Fac. (Octavo) Dec.*, 757.

(a) *Grafton v. Armitage*, 2 C. B. 336; 15 L. J. C. P., 20.

necessary.(b) Where the defendant employed one H. to make certain chattels, and wished to pay him in lumber, H. preferred to be paid in goods from the plaintiff's store, it was then agreed between the plaintiff, defendant, and H., that the plaintiff should pay H. in goods for what the defendant owed H., and that the defendant should pay the plaintiff in lumber. H. did the work and plaintiff asked for pay. It was held to be a contract for work and labor, and not for chattels, etc. It did not appear whether the plaintiff had paid H. or not; H. was regarded as the plaintiff's servant to do the work.(c) In a case since Lord Tenterden's act (9 Geo. IV., c. 14, § 7), it was held that a printer may recover under a count for work done and materials furnished on a contract by which he was to furnish the paper and print a book for the defendant, and the seventeenth section does not apply; and the Court of Exchequer said that before Lord Tenterden's act the Statute of Frauds did not apply where the contract required any preparation upon the goods, hence this particular question can only arise since that act, *i. e.*, where there is both labor and material furnished.(d) In an Indiana case an agreement to assist in driving hogs to market, and to have a share in the profits of their sale, was held not to be within the Statute of Frauds, but this may have been because of the contract being a partnership, and so not within the Statute.(e) As will be seen later the necessity of putting work and labor upon a chattel will take a contract of sale out of the Statute.(f) Where the plaintiff agreed to buy a mill on the defendant's land, and run it at his own expense, and the defendant agreed to deliver lumber from his own land at his own cost at the mill, and both were to share the profits of the sale of the sawed timber,

(b) *Chanter v. Dickinson*, 5 M. & G. 259.

(c) *Mather v. Perry*, 2 Den. 163.

(d) *Clay v. Yates*, 1 H. & N. 77. Martin, B., said the test was what should the plaintiff receive if the work had been delivered, the value of the book which might be nothing, or the value of the labor. **Atkinson v. Bell* (opinion of Bayley, J.), was set off

against *Grafton v. Armitage* (opinion of Maule and Erle, JJ.).

(e) *Kelsey v. Henry*, 48 Ind. 37.

But see *contra*, *Barbour v. Disler*, 11 Rich. Law, 349, and *infra*, where the necessity of the transportation of the chattels sold does not make the contract one of labor rather than sale.

(f) *Cason v. Cheely*, 6 Ga. 554; *Watts v. Friend*, 10 B. & C. 448.

it was held that the Statute of Frauds did not apply.(g) A promise that if the plaintiff would take shares in a corporation about to be organized the defendant would either pay for them or find some one to take them off the plaintiff's hands, is rather a contract to find a purchaser, than one to buy the shares.(h) A contract for performing work and furnishing materials is good by parol.(i)

§ 243. A promise to procure certain goods and sell them has, in a number of cases, been regarded as valid though oral.(j) A contract for a certain compensation to obtain and deliver certain goods is not within the Statute of Frauds.(k) In a briefly reported and doubtful case in New York, it was held, perhaps on this ground, that a contract to supply a milkman with milk for a year, is not within the Statute.(l) It was held, however, in Wisconsin, that a promise to buy a chattel and then sell part of it, is invalid if oral.(m) In an Iowa case, it was held that the fact that the plaintiffs being in New York, and the defendants being in Iowa, will not take a sale of chattels out of the Statute of Frauds merely because the plaintiffs, the vendors, would have to go to trouble and expense in procuring for and despatching to the defendants, the vendees, the goods in question.(n) And the rule adopted in some states, that the Statute of Frauds applies to all cases except where the seller, out of the usual course of his business, undertakes to procure or make a certain article, or to make under a special order such an article as he would not make for the general market, is clearly a different undertaking from the one above given, and is quite inconsistent with it.(o)

(g) *Jones v. McMichael*, 12 Rich. Matthison v. Westcott, 13 Vt. 262; Deal (So. Car.) Law, 181. v. Maxwell, 51 N. Y. 652; Spencer v.

(h) *Green v. Brookins*, 23 Mich. 52.

Cone, 1 Metc. (Mass.) 283.

(i) *Dutch v. Mead*, 36 N. Y. Super. 431.

(k) *Webster v. Zielly*, 52 Barb. 482.

(l) *Baumgartner v. Fowler*, 19 Law Reporter (Low.) (S. C. N. Y.), 381.

(j) In the following there was also a stipulation to manufacture the material so procured: *Phipps v. McFarlan*, 3 Min. 100; *Seymour v. Davis*, 2 Sandf. 239; *Abbott v. Gilchrist*, 38 Me. 260;

(m) *Brown v. Slauson*, 23 Wis. 248.

(n) *Partridge v. Wilsey*, 8 Ia. 461.

(o) *Goddard v. Binney*, 115 Mass. 454, citing cases.

§ 244. This difference of opinion brings us to the consideration of those cases in which the procurement of goods not then *in esse* was given as the reason of making an exception to the Statute, and next in order, those cases in which the contract was to make and sell the goods in question. However strict in other decisions, the test has been that a contract is within the Statute of Frauds, unless it was for a special order involving peculiar skill, or was one not in the line of the seller's business, yet there remains a long list of cases in which a lower standard was chosen, and the fact of the non-existence of the goods sold at the time of the contract of sale was considered of sufficient force to take the agreement out of the Statute. The following are some examples: Thus, where the defendant promised the plaintiff that if he, the latter, would ship certain corn by the defendant's vessel, he, the defendant, would take it at once to B., and thence bring back coals, and deliver the coals at J. to the defendant at a certain price, it was held that the Statute of Frauds was no bar. The contract was to get the coals if there were any at B.; and when the contract was made the defendant had no coals, and hence the contract was executory, and not within the Statute. Gifford, L. C. J., thought it not a contract of sale, but a contract to provide coals for the plaintiff at B., and to carry them for him, and deliver them to him at J. (p) So Judge Story decided that a contract to deliver goods not then in existence was not within the Statute of Frauds. (q) So a contract to procure certain goods, the court saying, that if the party could not get them he would not be liable, whereas, if the agreement had been a sale he would have been. (r) So a contract of sale of shares of stock, intended to be issued by a corporation increasing its stock; the court saying, that the distinction between goods in existence and those intended to be made, though violative of the Statute of Frauds, is well settled. (s) In Iowa the question

(p) Cobbold v. Caston, 8 Moo. 460 ;
1 Bingham, 400.

(q) Low v. Andrews, 1 Story, 38.

(r) Bird v. Muhlinbrink, 1 Rich. 201 ;
see Pitkin v. Noyes, 48 N. H. 297.

(s) Gadsden v. Lance, 1 McMull. Eq.
90, citing cases ; see Green v. Brookins,
23 Mich. 52.

is settled by statute,^(t) and it was said in an early case that the fact which removes a parol contract from the operation of the Statute of Frauds under this contract can well exist outside of the contract. The party should have been permitted to prove his contract and the facts which would take it out of the Statute. If the plaintiff could prove that at the time the contract was made the hogs were not owned by the defendant—not ready for delivery; that labor, skill, or money would necessarily have to be expended before they could be produced or delivered, then he would have taken the case out of the Statute.^(u) The early and dubious case of *Clayton v. Andrews* rests partly on this view, and a promise to sell certain wheat was said not to be within the Statute of Frauds, because not being threshed the wheat could not be delivered.^(v) And in another decision, distinguishing and doubting *this* ruling, a point of distinction was made in that the goods in the later case existed *in solido* at the time of the contract made.^(w)

§ 245. These cases lead directly to that second category in which the promise is to furnish goods not *in esse* when the contract of sale was made; impossible as it is to reconcile the rule with the great body of modern decisions, there is certainly authority for holding that a promise to furnish a chattel not then in existence is not within the Statute of Frauds. Thus, a contract for the sale of oak pins not then made, but to be cut out of slabs, was held not to be within the Statute of Frauds, as the goods were not in *rerum naturâ* at time of the contract, and were therefore incapable of acceptance and delivery.^(x) So a contract to make and put up in the defendant's premises certain spindles was held to be for labor, not for goods, and one requiring a

Contract to supply goods not yet *in esse*, cases not within the Statute.

(t) Rev. St., § 4008; Code, § 2411; *Brown v. Allen*, 35 Ia. 309, citing *Partidge v. Wilsey*, 8 Ia. 459.

(u) *Bennett v. Nye*, 4 Greene, Ia. 410.

(v) *Clayton v. Andrews*, 4 Burr. 2101; see *Rentch v. Long*, 27 Md. 197, a contract to deliver corn not yet gathered.

(w) *Cooper v. Elston*, 7 T. R. 16.

(x) *Groves v. Buck*, 3 M. & S. 179, distinguishing *Rondeau v. Wyatt*, as a case where there might have been delivery. See, however, *Garbutt v. Watson*, 5 B. & Ald. 613; and *Smith v. Surman*, 9 B. & C. 561; overruling *Groves v. Buck*; see, also, *Cason v. Cheely*, 6 Ga. 556.

stamp.(y) So, where there was an order to have a chattel manufactured, and the question was whether till completion any title passed so as to be liable for vendee's debt, it was held that no title passed, Judge Heath saying this is the species of contract, which, in the civil law, is described by the term, *do ut facias*. It comes within the cases which have been held to be executory contracts, and as such not within the Statute of Frauds, as contracts for the sale of goods.(z) So, an order for clothes to be made is not within the Statute, as the articles were not in existence when the promise was made; and this though the sellers were tailors.(a) So, in a New Jersey case, it was said that an order for a chattel not *in solido*, and to be made out of the seller's usual line of business, and under a special order, is not within the Statute of Frauds.(b) A contract for the manufacture and delivery of certain staves from a particular lot of timber is not within the Statute of Frauds.(c) In the Supreme Court of New York it was said that when the thing bargained for is not *in esse* at the time of the contract, and could not then be delivered or accepted, but is to be afterwards constructed or manufactured, the contract is held to be one for work and labor; as for a wagon, thereafter to be constructed, and the like. This class of cases does not fall within the Statute; and an action may be maintained for the contract price, counting on the agreement as a contract for work, labor, and material.(d) So, in another New York case, certain earlier decisions, holding oral sales of

(y) *Buxton v. Bedall*, 3 East, 305, citing *Towers v. Osborne*, distinguishing *Curry v. Edensor*, 3 T. R. 524, as a sale of goods then made.

(z) *Mucklow v. Mangles*, 1 Taunt. 319.

(a) *Lane v. Melville*, 3 U. C. Q. B. O. S. 127.

(b) *Finney v. Apgar*, 2 Vroom, 268.

(c) *Crockett v. Scribner*, 64 Me. 449, citing cases, and in *Cummings v. Dennett*, 26 Me. 399, it was suggested that it was when the goods are in existence

at the time of sale that the Statute of Frauds applies.

(d) *Bates v. Coster*, 1 Hun, 402; see *Ferren v. O'Hara*, 62 Barb. 527 (a contract to deliver malt); *Donovan v. Wilson*, 26 Barb. 138 (to make beer-barrels); *Sewall v. Fitch*, 8 Cow. 219 (to make nails); and see *Robertson v. Vaughn*, 5 Sandf. 1, reluctantly following *Sewall v. Fitch*; see *Bronson v. Wiman*, 10 Barb. 427; see *Goddard v. Binney*, 115 Mass. 454, stating the New York law to be as above.

chattels good were distinguished as sales of chattels not *in esse*.(e)

§ 246. The test of the existence or non-existence of the goods contracted for is inconsistent, as will be later seen, with much modern adjudication, and it has been expressly repudiated.(f) And it has been held that where the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the vendor's bestowing labor on his own raw materials, that is a case of a contract for sale within the Statute of Frauds.(g) So a contract, by one owning rape-seed, to deliver a certain amount of the oil does not require a stamp, but as "goods, wares, and merchandise" comes within the exception of 48 Geo. III., c. 149 (sched., Part I.).(h)

Cases
within the
Statute.

(e) *Cooke v. Millard*, 5 Lans. 245, distinguishing, on this ground, *Sewall v. Fitch*, *Groves v. Buck*, *Mead v. Case*, *Stephens v. Santee*. So *Parsons v. Loucks*, 4 Roberts. 217, distinguishing *Downs v. Ross* and *Seymour v. Davis*; see, also, *Pitkin v. Noyes*, 48 N. H. 297; distinguishing, on this ground, *Crookshank v. Burrell*, *Sewall v. Fitch*, *Robertson v. Vaughn*, *Brown v. Wiman*, *Donovan v. Wilson*, *Parker v. Schenk*, *Mead v. Case*. See *Parker v. Schenk*, 28 Barb. 38, citing Judge Bronson in *Downs v. Ross*; see *Downs v. Ross*. 23 Wend. 270.

(f) *Goddard v. Binney*, 115 Mass. 454; *Gilman v. Hill*, 36 N. H. 317, noticing *Groves v. Buck*, *Sewall v. Fitch*, and *Lower v. Winters*, 7 Cow. 263; *Frear v. Hardenburgh*, 5 Johns. 275; and citing as *contra* *Garbutt v. Watson*, and also, by way of analogy, *Parker v. Staniland*; *Warwick v. Bruce*; *Carter v. Jarvis*; see, also, *Meincke v. Falk*, 13 No. West. Rep. 545; 55 Wis., 427; *Ide v. Stanton*, 15 Vt. 689; *Pitkin v. Noyes*, 48 N. H. 297, relying on *Garbutt v. Watson*, *Smith v. Surman*,

and *Lee v. Griffin*; *Gardner v. Joy*, 9 Metc. 179; *Smith v. New York R. R.*, 4 Keyes, 198.

(g) *Prescott v. Locke*, 51 N. H. 96, citing *Garbutt v. Watson*, 5 B. & A. 612, and *Smith v. Surman*.

(h) *Wilks v. Atkinson*, 6 Taunt. 11; 1 Marsh. 412; *Gibbs, C. J.*, quoting the case of a butcher or baker.

The stamp act is broader in its language than the Statute of Frauds, and excepts by its proviso all contracts which relate to "goods, wares," etc.; see *Warrington v. Furber*, 8 East, 242; *Watkins v. Vince*, 2 Stark. 368; *Curry v. Edensor*, 3 T. R. 524; *Skrine v. Elmore*, 2 Campb. 407; *Venning v. Leckie*, 13 East, 7; *Whitworth v. Crockett*, 2 Stark. 431; *Heron v. Granger*, 5 Esp. 269; *Pinner v. Arnold*, 2 Cr. M. & R. 613; 1 G. & D., 271; 1 T. & G., 1; *Leigh v. Banner*, 1 Esp. 403; 6 Peters. Ab. (Am. ed.), p. 192-5; 4 Chitt. Stat. (3d ed.), p. 485, n., col. 2, p. 486, n., col. 1; Chitt. & Forst. Dig. of Convey., 689; Long, Sales (Rand's ed.), p. 96.

§ 247. Another test, and one well approved in modern law, is the stricter one which excepts from the Statute of Frauds only those sales of chattels in which the work and labor involved are under a special order given by the buyer.⁽ⁱ⁾ Thus, it has been said that where the contract is for the manufacture of an article by the seller, and his skill is what is stipulated for, the Statute does not apply.^(j) And it has been said that a contract for labor is where the article agreed for would never have been made but for the order.^(k) In another case it was said that "the person ordering the article to be made is under no obligation to receive as good, or even a better one of the like kind purchased from another for him. It is the peculiar skill and labor of the other party combined with the materials for which he, the purchaser, contracted, and to which he is entitled."^(l) And in a Massachusetts case it was said that "in this commonwealth a rule avoiding both of these extremes was established in *Mixer v. Howarth*, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the Statute applies; but, on the other hand, if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the Statute."^(m) Again it has been said, "That where a contract is made for an article not existing at the time *in solido*, to use

Goods made on special order. General principles; cases not within the Statute.

(i) *Parker v. Schenck*, 28 Barb. 39; *Edwards v. Grand Trunk R. W.*, 48 Me. 380; *Phipps v. McFarlan*, 3 Minn. 100; and see below; see, however, *Benj. Sales*, 11.

(j) *Pitkin v. Noyes*, 48 N. H. 297; *Passaic Man. Co. v. Hoffman*, 3 Daly, 502; 11 Am. Law Reg., N. S. 105.

(k) *Prescott v. Locke*, 51 N. H. 96; *Passaic Man. Co. v. Hoffman*.

(l) *Hight v. Ripley*, 19 Me. 139, distinguishing *Garbutt v. Watson*, as a case where any article of the kind sold would have answered, and saying that *Towers v. Osborne* was rightly decided, but for wrong reasons; see *Pitkin v. Noyes*, 48 N. H. 297.

(m) *Goddard v. Binney*, 115 Mass. 454, citing cases.

the expression of the old cases, and when such article is to be made according to order, and as a thing distinguished from the general business of the maker, then such contract is in substance and effect not for a sale, but for work and materials.”(n) In a late Wisconsin case the court said: “While an executory contract for the sale of an article for the price of \$50 or more, may be within the Statute notwithstanding such article does not at the time exist *in solido*, yet where such contract is to furnish materials and manufacture the article according to specifications furnished or a model selected, and when without the contract the thing would never have been manufactured in the particular manner, shape, or condition it was, then the contract is essentially for special skill, labor, or workmanship, and is not within the Statute.”(o) The Statute of Frauds was not applied to an oral contract by a mechanic to furnish materials and do carpenter work according to a specific plan.(p) The order for a chariot to be made under special directions is not within the Statute of Frauds.(q) So a contract for a sideboard to be made after a particular order, and in which the buyer from time to time directed changes to be made.(r) So, where the purchaser chose the material and the place of work;(s) or where the order was for articles made only upon order,(t) as portable houses of a specified size.(u) Where the articles ordered were of a peculiar kind, and were to be furnished as called for, they were presumably manufactured after the order given for them, and they were

(n) *Finney v. Apgar*, 2 Vroom, 268, denying *Lee v. Griffin*, *infra*.

(o) *Meincke v. Falk*, 13 No. West. Rep. 545; 55 Wis., 427; *Hardell v. McClure* was distinguished as a mere contract to sell and deliver a certain quantity of wheat. *Lee v. Griffin* was thought to rest only on Lord Tenterden's act (but that act was *semble* merely declaratory, and did not apply to such a case as *Lee v. Griffin*); many cases were cited and considered, one judge dissented. See § 251, n. (r).

(p) *Courtright v. Stewart*, 19 Barb. 455.

(q) *Towers v. Osborne*, 1 Stra. 506; *Alexander v. Comber*, 1 H. Bl. 20; *Goddard v. Binney*, 115 Mass. 454 (where the carriage so made was to be marked with the buyer's initials); see *Mixer v. Howarth*, *infra*.

(r) *Donegani v. Molinelli*, 14 Low. Can. Jur. 106, citing cases, and saying that Civ. Code, § 1235, made no difference in regard to this point; the court relied upon the “usual business” test.

(s) *O'Neil v. Mining Co.*, 3 Nev. 145.

(t) *Prescott v. Locke*, 51 N. H. 96.

(u) *Phipps v. McFarlan*, 2 Minn. 112.

ordered because of their special quality. ("Finding your warps uniform we shall be faithful to you," was the language of a letter of the defendant, and there was a presumption, owing to a great fall in the price of the article, that but for the defendant's order the articles would never have been made.) For all these reasons the court held the contract to be one of labor and not of sale.^(v) So a contract to procure and deliver one-half of a frame for a vessel to be hewn according to certain moulds is a contract for manufacture and not for sale of goods, and is not within the Statute of Frauds;^(w) or to make hoes according to a pattern left by a purchaser;^(x) or to make a certain stave machine.^(y) So where a buyer, not satisfied with the seller's pumps, ordered a pump made specially for himself in a particular way, the price depending upon the amount of material required.^(z) In a case in 5 Daly the court said:^(a) "This was not a contract for the sale and delivery of goods, wares, and merchandise, in which both delivery and acceptance are essential to the validity of the contract under the Statute of Frauds. It was the employment of an artist to copy in crayons a photograph, for which he was to be paid a specified sum; an agreement for the performance of work and labor, in which almost the sole ingredient was his labor and skill; the materials, which consisted of the canvass upon which the work was executed and the crayon pencils with which it was done being unimportant, and merely ancillary to the contract for skill, work, and labor. It was an article moreover (a portrait of the plaintiff's child) which could be of little value to any but the plaintiff himself, and was never intended to be the subject of sale and purchase. So a contract to procure the materials and make two grave-stones.^(b)

(v) *Passaic Man. Co. v. Hoffman*, 3 Daly, 502; 14 Am. Law Reg., N. S., 105, citing and considering many cases, and holding *Downs v. Ross and Sewall v. Fitch*, overruled by *Smith v. R. R. Co.*; see *Prescott v. Locke*, 51 N. H. 96, distinguishing *Gardner v. Joy*.

(w) *Abbott v. Gilchrist*, 38 Me. 260.

(x) *Hight v. Ripley*, 19 Me. 139.

(y) *Spencer v. Cone*, 1 Mete. (Mass.) 283.

(z) *Parker v. Schenck*, 28 Barb. 38.

(a) *Wright v. O'Brien*, 5 Daly, 55; see, also, *Passaic Man. Co. v. Hoffman*, 3 id. 502; 11 Am. Law Reg., N. S., 105.

(b) *Matthison v. Westcott*, 13 Vt. 261; so *Mead v. Case*, 33 Barb. 204, the court saying that the monument

§ 248. In the following cases also the Statute of Frauds was held not to apply, but their correctness is, perhaps, open to doubt. Thus, in the well known case of *Mixer v. Howarth*, the order was for a carriage already made, and all that was done was to line it with a stuff chosen by the buyer.^(c) So, a recovery, notwithstanding the Statute of Frauds, was allowed for making certain surgical instruments, though the evidence showed that the parts of the instrument were procured in a finished condition, and the seller's labor was only in putting them together.^(d) And in a New York case, it was said that the work of finishing a certain monument involved additional skill, different from, and of a higher character than the original work thereupon.^(e) In suit upon a contract for the manufacture of a cotton-gin made under a general order, a nonsuit was set aside in order that the question, whether the contract was for a sale or for work and labor, might be determined as a fact by the jury.^(f)

§ 249. The following are New York cases in which the Statute of Frauds was held not to apply, but which are not sustained by the decision of any other state: ^{The New York cases.} Thus, a contract to procure cider, refine it and sell it.^(g) So, a promise to procure materials and manufacture certain stuff.^(h) So, a contract to manufacture paper by the seller in his usual course of business, the paper to be of the same kind and quality as other paper previously ordered by the buyer according to particular sizes and weights.⁽ⁱ⁾

§ 250. The following are examples of contracts held not to be special orders, but ordinary sales, and within the Statute of

could not be sold to any one but the first purchaser, one judge dissenting; see, *contra*, *Wolfenden v. Wilson*, 33 U. C. Q. B. 445.

(c) 21 Pick., 207; see *Cummings v. Dermott*, 26 Me. 401, and *Flint v. Corbitt*, 6 Daly, 430, *contra*.

(d) *Allen v. Jarvis*, 20 Conn. 53, citing cases.

(e) *Mead v. Case*, 33 Barb. 204.

(f) *Winship v. Buzzard*, 9 Rich. 105.

(g) *Seymour v. Davis*, 2 Sandf. 242.

(h) *Deal v. Maxwell*, 51 N. Y. 652.

(i) *Parsons v. Loucks*, 4 Roberts, 217, citing very many cases, and denying *Gardner v. Joy* and *Lamb v. Crafts*; *Gray* (commissioner) dissented, relying on *Downs v. Ross*; see *Higgins v. Murray*, 73 N. Y. 254.

Frauds: A purchase of certain chandeliers.(j) And where the plaintiffs gave the defendants, who were commission merchants, a written order for certain goods, they must prove the contract to have been one of manufacture, and not, as the writing would indicate, of mere sale, if they want to escape the Statute of Frauds.(k) And where the contract, as proved, was that the plaintiff should have the manufactured iron as fast as it was made, until he was paid for advances in money and provisions to the amount of eight or twelve hundred dollars, and also for a certain proportion of rent. The court said "this was a contract of sale, within our Statute of Frauds. Without going into a collation of the authorities, we think we may safely decide, that the contract in this case was for the sale of manufactured iron, and not for the work and labor bestowed on manufacturing it."(l) In a suit for bending-stuff and planks, the plaintiff testified, that bending-stuff was the butts of trees, sawed so as to render them suitable to be manufactured into wagon shafts, and that "the defendant was to saw all the logs not suitable for bending-stuff into plank of various dimensions, under the direction of the plaintiff. And the court held that the Statute of Frauds applied.(m) Even in New York, where the disposition to uphold oral sales of chattels was so strong, it has been held that a purchase of chairs for which the buyer chose a covering, and which were to be covered and varnished by the seller, is within the Statute of Frauds, though the covering was of an unusual pattern, and might make the chairs less saleable.(n) So, the Statute was held to apply to a contract to deliver to the plaintiff certain sewing machines not then finished, the machines to be completed by a third person who worked for the defendant, the contract between the two latter being that the defendant was to provide a shop and its fittings, and the third person to

(j) United States Reflector Co. v. the court saying that the case came Rushton, 7 Daly, 412. within the category of Gardner v. Joy,

(k) Miller v. Fitzgibbon, 12 N. Y. 9 Metc. 177, and Lamb v. Crafts, 12 W. Dig. 237. Metc. 13, and not within that of Mixer

(l) Sawyer v. Ware, 36 Ala. 681. v. Howarth, and Spencer v. Cone.

(m) Clark v. Nichols, 107 Mass. 548; (n) Flint v. Corbit, 6 Daly, 430.

make the machines to be paid for at so much each.(o) So, a contract for a certain number of spokes to be made and delivered.(p) So, a contract for a tomb-stone, in absence of evidence that it was to be of a peculiar sort, is for a chattel and within the Statute; that it is to be put up at the grave will not make any difference.(q)

§ 251. In an extreme and perhaps doubtful case in the Queen's Bench, the Statute of Frauds was held to apply to a contract to make a set of false teeth which should fit the buyer's mouth.(r) So the preparation of stone work under a plan furnished by the buyer, and intended for the latter's portico, was regarded as a contract for chattels, and within the Statute of Frauds.(s) It has been held that if the goods when completed are wares and merchandise the Statute of Frauds applies.(t) Thus, a contract to make certain apparatus which, when finished, will result in a chattel worth more than £10, cannot be sued on as for work and labor.(u) But this rule, unless subject to exceptions, is not consistent with other views expressed in this chapter, and has indeed been denied.(v)

§ 252. A valuable test for ascertaining whether the Statute of Frauds applies or not, is that which asks whether the contract for goods to be sold (whether *in esse* or not, or whether requiring to be first procured or made), is one

Modern
English
rule.

Usual busi-
ness rule.

(o) Atwater v. Hough, 29 Conn. 513.

(p) Prescott v. Locke, 51 N. H. 96.

(q) Wolfenden v. Wilson, 33 U. C. Q. B., 445, citing Lord Tenterden's act (Consol. Stat. U. C. C., 44, § 11); Lee v. Griffin, relied on, and Clay v. Yates considered; Pollock's test in Clay v. Yates, rather than that expressed by Blackburn in Lee v. Griffin, followed.

(r) Lee v. Griffin, 1 B. & S. 276; 30 L. J. Q. B. 252. Blackburn, J., thought that test was whether the work and labor were to result in the production of a chattel, if so, the Statute of Frauds applied, even where a sculptor agreed to deliver a statue; this rule was said to reconcile the above cases. He also

doubted Clay v. Yates, but of this case Hill, J., approved; Atkinson v. Bell, except as to a dictum repudiated in Grafton v. Armitage, was approved.

(s) Cameron v. Pettigrew, Arm. Mac. & O. (Irish N. P.) 128.

(t) Smith v. Surman, 4 M. & R. 465, denying Groves v. Buck and Towers v. Osborne; see Lord Blackburn's dictum in Lee v. Griffin, and Judge Little-dale's in Smith v. Surman, 9 B. & C. 561.

(u) Lyons v. Hughes, 1 Vict. L. Rep. Law, 41.

(v) Phipps v. McFarlan, 3 Minn. 100; see Passaic Man. Co. v. Hoffman, 3 Daly, 502; 11 Am. L. Reg. N. S. 105.

in the usual line of the seller's business, in which case the Statute applies, or is one of a special and particular character, when the Statute may not apply.^(w) In a New Jersey case the various tests ordinarily applied were fused into a single rule to the effect that where a contract is made for an article not existing at the time *in solido*—to use the expression of the old cases—and when such article is to be made according to order, and as a thing distinguished from the general business of the maker, then such contract is in substance and effect, not for a sale, but for work and materials.^(x) In New York, with the tendency always shown there to relax the requirements of the present clause of the Statute of Frauds, the rule under consideration has been so far extended as to include a contract, which not in kind but in quantity differs from those ordinarily made by the seller in his usual course of business. Thus it has been said that it may be stated as a conclusion to be derived from the cases, that if an order is given to a manufacturer for a certain quantity, at a certain price, of an article which he is habitually manufacturing, and keeps on hand to supply orders, it is, in general terms, to be regarded as a contract of sale, and should be in writing to make it binding; for the party giving such an order is not called upon to inquire what quantity the manufacturer has on hand, or whether it will or will not be necessary to manufacture it, in whole or in part, to fulfil the order. But if, with the knowledge that the manufacturer is not supplied with the article ready made, the party orders a certain quantity to be manufactured at a certain price, then it is an agreement for the production of the article, and not for the sale of it after it is produced, for it may be that but for the order, the manufacturer would not at that time, in the ordinary prosecution of his business, manufacture such a quantity for the reason that it may, by the time it is manufactured and ready for delivery, depreciate in value in the market, as was the fact in the case before

(w) O'Neil v. N. Y., etc., Mining Co., 3 Nev. 145; Bird v. Muhlinbrink, 1 Rich. 201; Partridge v. Wilsey, 8 Ia. 461; Donegani v. Molinelli, 14 Low. Can. Jur. 106; Pitkin v. Noyes, 48 N. H. 297, citing Lamb v. Crafts, or, to the same effect, Flint v. Corbitt, 6 Daly, 430; see, however, Benj. Sales, 11. (x) Finney v. Apgar, 2 Vroom, 268.

us.”(y) A contract for the sale of flour is within the Statute of Frauds, as the sellers were proceeding to grind it for the purposes of general sale, and sold it as part of their stock.(z) A contract by a tallow-chandler to furnish one with refined tallow, was held to be within the Statute of Frauds, Shaw, C. J., saying that “when a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise where the article is made pursuant to the agreement.” The chandler’s business was to procure rough tallow, refine, and sell it.(a) But it has been said that it is very clear that if application is made to a mechanic or manufacturer for articles in his line of business, and he undertakes to prepare and finish them in a given time, such a contract, though not in writing, is not affected by the Statute.(b) There are, it need not be again said, many other decisions in which the “usual business” rule has been entirely discarded.(c) A contract for goods easily procurable, and, if rejected by the buyer, readily saleable is within the Statute of Frauds.(d)

§ 253. Insufficient on principle as would seem the doctrine, yet there has been, both in England and America, much authority for making an oral contract of sale of chattels valid notwithstanding the Statute of Frauds, if some labor was necessary in the mere previous preparation of the goods. By the provisions of Lord Tenterden’s act this point is now set at rest;(e) and such preparation is declared to be of no effect in dispensing with the Statute of Frauds, and it may be said that, notwithstanding irreconcilable conflict of decision, such is the weight of autho-

Previous
preparation
rule; cases
within the
Statute.

(y) *Passaic Man. Co. v. Hoffman*, 3 Daly, 502; 11 Am. Law Reg. N. S. 105.

(z) *Garbutt v. Watson*, 5 B. & Ald. 613, overruling *Clayton v. Andrews*, and distinguishing *Towers v. Osborne* as a special order, and considering it an extreme case.

(a) *Lamb v. Crafts*, 12 Metc. (Mass.) 356.

(b) *Cummings v. Dennett*, 26 Me. 401.

(c) See *Lane v. Melville*, 3 U. C. K. B. O. S. 127.

(d) *Cason v. Cheely*, 6 Ga. 554; see, however, *Flint v. Corbitt*, 6 Daly, 430.

(e) 4 Geo. IV., c. 14, § 7. This statute has been considered as merely declaratory; *Story, Contr.*, 5th ed. 198, n.; *Smith on Contr.*, 6th Am. ed.

city apart from this and like enactments. In a case in 38th Vermont the law was summed up as follows: "That the fact that work and labor is to be performed upon the subject matter of the contract before it is to be delivered, in accordance with the terms of the contract, does not necessarily take it out of the Statute. Whether it is to have such an effect or not depends upon the nature and character of the labor to be performed, and its effect upon the subject matter. The fact that labor is to be bestowed upon the property to remove it from the place where it is at the time of the contract to the place of delivery is not sufficient, although the value of the property at the place of delivery may consist principally in the expense of removing it to such place. The contract must require the performance of such work and labor upon the property as shall materially and essentially change the character of the property itself, so that the property as it is to be when delivered, must be substantially different from what it is at the time the contract is entered into, in order to take the contract out of the Statute. In short, it must be of such a character as to bring the contract within the rule that excepts from the operation of the Statute contracts for the manufacture of property, or convert it substantially into a contract for work and labor."(*f*) That an oral contract of sale of goods contains a stipulation as to transportation, and the cost of the latter is included in the price, is not a reason for holding the agreement valid.(*g*) So a contract to drive certain cattle from Florida to Charleston, and there deliver them at so much per pound, is within the seventeenth section of the Statute of Frauds. The transportation is not a contract for work and labor.(*h*) Boxing up and transporting chattels sold does not take the case out of the Statute of Frauds.(*i*) A contract which included the sale of one mare and foal, and the agistment of another mare and foal, if entire, is within the Statute

(*f*) *Ellison v. Brigham*, 38 Vt. 66.

Frauds: *Atwater v. Hough*, 29 Conn.

(*g*) *Astey v. Emery*, 4 M. & S. 264; and see the chapter on Severability to the effect that a contract, including the sale and transportation of goods being partly is wholly within the Statute of

513; see *Irvine v. Stone*, 6 Cush. 501.

(*h*) *Barbour v. Disler*, 11 Rich. Law, 349, citing *Winship v. Buzzard*.

(*i*) *Atwater v. Hough*, 29 Conn. 513.

of Frauds, even as to the agistment, and a *quantum meruit* is the only remedy for the latter.(j) So where there was a contract for a colt, to be delivered at a future time, gelded and well, at the price of \$1000. The animal was present before the contracting parties, and was the precise property agreed to be delivered. True, an operation was to be performed of great hazard, involving however little labor and trifling expense. The plaintiffs assumed the expense and risk, for they were to deliver the colt gelded and well. It was the animal that was contracted for, not the incident of castration. The labor, expense, and risk of the operation were for the plaintiffs. The animal was the subject of the purchase and sale, to be gelded before delivery.(k) The court saying also, again, when the subject of the contract exists at the time *in solido*, but something is agreed to be done to it to put it in condition for use, or to make it marketable, the contract is held to be one of sale, and void within the Statute, yet the rule thus laid down has perhaps some exceptions. The following memorandum was held to show a contract for "goods, wares, and merchandise," and not therefore to require a stamp under 9 Geo. IV., c. 14, § 7: "I dou aggree to take all the mannure at four pence each horse a week for 45 horses by the year, and to keep it cleard away every week; and likewise to let the few Gardeners have a few loads at the same price, and serve them; and to let me have during the year 60 loads of straw at £1 9s. pr. load: began the year 23 July 1853 and ends 23 July 1855."(l) So a contract by one who has rape-seed to deliver a certain amount of the oil therefrom.(m)

§ 254. The following are some further examples of contracts of sales of goods requiring preparation previous to delivery, yet within the Statute of Frauds. Thus, a sale of wheat in existence, but not yet threshed.(n)

General
examples
of cases
under this

(j) *Harman v. Reeve*, 18 C. B. 595; 25 L. J., C. P., 257.

(k) *Bates v. Coster*, 1 Hun, 402, considering *Mead v. Case*.

(l) *Gurr v. Scudss*, 1 Exch. 190.

(m) *Wilks v. Atkinson*, 6 Taunt. 11; 1 Marsh., 412, citing the stamp

act 48 Geo. III., c. 149, Sched., Part I., title Agreem.

(n) *Hardell v. McClure*, 1 Chand. 275, citing *Garbutt v. Watson*, *Atkinson v. Bell*, *Smith v. Surman*, and *Downs v. Ross*; and saying that the law had been the other way, in England, from

rule, and within the Statute of Frauds; crops; timber.

So a contract to buy flax straw to be raised from forty-five bushels of flaxseed, the straw to be delivered in a dry condition free from weeds.(o) So a contract to sell and deliver, at a fixed price per quantity, all the broomcorn on a certain tract of land is within the Statute.(p) So a promise to deliver a hundred barrels of apples.(q) So a contract for the sale and delivery of a quantity of wood, then standing timber.(r) So where lumber ordered by the defendants of the plaintiffs, was to be examined by the defendants to be taken to the plaintiffs' planing-mill, dressed by them, put on their wharf, and delivered to P.; the defendants' purchase was of dressed lumber; this was held to be a contract of sale of goods, and not one for work and labor.(s) A contract for boards, at so much per foot, board measure, to be sawed from logs at the plaintiff's expense, but under the defendant's direction, is within the Statute of Frauds.(t) So a contract for the sale of wool-pelts to be taken off during a certain season.(u) The purchase of certain marble chimney-pieces described, the vendor agreeing to finish them in a workmanlike manner, is a contract relating to goods sold and not to labor, and requires no stamp.(v)

Towers v. Osborne (1724) to *Garbutt v. Watson* (1822), and, in America, from *Eichelberger v. McCauley* (1766) to *Downs v. Ross* (1840); but saying, also, that Lord Tenterden's act was only declaratory of the previous law; see, as to this last point, *Cason v. Cheely*, 6 Ga. 554; also *Downs v. Ross*, 23 Wend. 270, citing *Astey v. Emery*. Judge Bronson, after saying how much it had cost to explain the Statute of Frauds (a million or so of pounds sterling), went on to remark that it never would be explained "so long as it is held that a promise by a seller to thresh his grain, or to blow the chaff out of a bin of wheat before sending it to market, changes a contract of sale into an agreement for work and labor;" *Cason v. Cheely*, 6 Ga. 554 (a contract to sell growing cotton).

(o) *Brown v. Sanborn*, 21 Minn. 402.

(p) *Bowman v. Conn*, 8 Ind. 58, citing *Watts v. Friend*, and distinguishing the work to be bestowed from the crop from the skill required in, making a wagon, for example.

(q) *Bennett v. Hull*, 10 Johns. 364; see *O'Neil v. New York*, etc., R. R., 3 Roberts. 403.

(r) *Smith v. New York*, etc., R. R., 4 Keyes, 180, citing *Downs v. Ross*, *Garbutt v. Watson*, *Smith v. Surman*; *Edwards v. Grand Trunk R. R.*, 48 Me. 380; *Ellison v. Brigham*, 38 Vt. 66, citing *Smith v. Surman*, and many other cases.

(s) *Cooke v. Millard*, 5 Lans. 245.

(t) *Gorham v. Fisher*, 30 Vt. 428.

(u) *Gilman v. Hill*, 36 N. H. 317.

(v) *Hughes v. Breed*, 2 C. & P. 159.

So a general contract for the delivery of a quantity of planks for ship-building at a future time, and for a specified price, is within the Statute of Frauds.^(w)

§ 255. Though, as will be seen presently, the effect of preparation of the chattels in making an exception to the Statute of Frauds has always been considered ^{Late New York cases.} very potent in New York, there are some late cases which tend to make the law of that State more in accordance with the decisions elsewhere. Thus, in a case in 6 N. Y. Supreme Court, the court said: "This was a contract for sale, not for work and labor. The plaintiffs were not to make the hams; they were to smoke them. Before the articles were put into the smoke-house they were hams unsmoked; when taken away, they were hams smoked. The case of *Bates v. Coster*, 3 N. Y. Sup. 580, clearly states the doctrine, and is analogous to the present. It is unnecessary to repeat what is there said so well, or to cite the cases there collected."^(x) And in another case in the Common Pleas of New York it was said that where the understanding of the parties at the time of the agreement is that the article is to be produced in whole, or in a material degree by work and labor, it may be regarded as a contract for work and labor;^(y) but if the thing contracted for is then in existence, but something remains to be done to finish it, or put it in the condition required by the contract when it is to be delivered, then it is a contract of sale.^(z) When the contract is for the purchase of an article which the vendor usually has for sale in the course of his business, which he keeps in his warehouse substantially made, but not entirely finished, that the taste or wish of the purchaser may be consulted as to the final finish, the finishing of it in the way that the purchaser prefers does not change it from a contract of sale into a contract for work and labor. What is in contemplation of the parties is the purchase and

^(w) *Waterman v. Meigs*, 4 Cush. 498.

^(y) *Flint v. Corbitt*, 6 Daly, 430, citing cases.

^(x) *Kellogg v. Witherhead*, 6 N. Y. Supreme Ct. 526; and see *Cooke v. Millard*, *Smith v. New York R. R.*, *Downs v. Ross*.

^(z) Citing *Atwater v. Hough*, *Smith v. New York*, etc., R. R.

sale of an article which is examined and selected, but upon which something more is to be done, which, as a matter of taste, choice, or expense, is left to the purchaser, and being determined by him, is included in the price, and is done thereafter by the vendor, that he may deliver the article sold and receive the price.(a) So a contract, by which the sellers were to finish a sleigh chosen at their shop by the buyer and deliver it to him, does not give title to the latter till the article is actually finished and delivered; before the sleigh was delivered, the sellers, who were *semble* sleigh-makers, failed, and it was held that the sleigh passed to the assignee.(b)

§ 256. However strong is the modern tendency against making an exception to the Statute of Frauds because of previous preparation of chattels being necessary before their delivery under a sale, the law was at one time almost as clear the other way. In New Hampshire the court evaded the responsibility of the question by leaving the whole matter as one of fact to the jury.(c) The well-known, but now overruled, case of *Clayton v. Andrews* is the *fons et origo mali*,(d) and has been followed in a number of instances in America,(e) and specially so in New York.(f)

§ 257. A distinction has been made that where the preparation is for the seller, the contract is merely one of sale, but if for the buyer, that then it may be an agreement for work

(a) *Flint v. Corbitt*, citing *Downs v. Ross*, *Cason v. Cheely*, *Bates v. Coster*, *Cooke v. Millard*.

(b) *Halterline v. Rice*, 62 Barb. 598, citing *Mixer v. Haworth*, *Atkinson v. Bell*, 8 B. & C. 277; *Maberly v. Sheppard*, 10 Bingh. 99; see, however, *Ferren v. O'Hara*, 62 Barb. 527.

(c) *Pitkin v. Noyes*, 48 N. H. 297; and see *Winslip v. Buzzard*, 9 Rich. 105.

(d) 4 Burr. 2101, overruled as to the "executory" distinction by *Rondeau v. Wyatt*, and as to the "preparation" one by *Garbutt v. Watson*.

(e) *Bird v. Muhlinbrink*, 1 Rich. 201;

Gadsden v. Lance, 1 McMull. Eq. 90; *Eichelberger v. McCauley*; *Rentch v. Long*, 27 Md. 197 (a contract to deliver wheat then ungathered).

(f) *Jackson v. Covert*, 5 Wend. 141, citing *Sewall v. Fitch*, *Crookshank v. Burrell*, *Ferren v. O'Hara*, 62 Barb. 527; the court felt bound by *Donovan v. Wilson*, 26 Barb. 138, though approving of the opposite rule; the contract was to deliver malt to be manufactured by the seller, and to be paid for by the quantity on delivery; and see *Goddard v. Binney*, 115 Mass. 454, for a dictum stating the New York law.

and labor, and not within the Statute of Frauds.^(g) Thus in a case in 19 Barb. the court, after quoting Shaw's rule in *Mixer v. Howarth*, added: "A still more accurate criterion is to inquire whether the work and labor required in order to prepare the subject-matter of the contract, for delivery, is to be done for the vendor himself or for the vendee. In the former case the contract is really a contract of sale, while in the latter it is a contract of hiring."^(h) And this rule was applied where one D. agreed to cut ties from his own land and deliver them to Santee, at so much per tie; Santee furnished the money as the work progressed, and the timber was to be his as soon as cut. The ties were cut and hauled to the land of a third person, and there verbally turned over to Santee as his property: and it was held that they could not be levied on as D.'s property, and that the Statute of Frauds did not apply to such a contract. The rule was declared to be that where work upon the subject-matter of the sale is to be done for the vendee, the case is taken out of the Statute.⁽ⁱ⁾ However excellent theoretically, it is to be feared that this test will often prove illusory, when actually applied, for there is usually nothing to show for whom the labor is done.^(j)

The preparation, whether for the buyer or the seller.

The utility of the chattels clause of the Statute of Frauds has been often questioned.^(k)

(g) See *Prescott v. Locke*, 51 N. H. 96; *Bird v. Muhlinbrink*, 1 Rich. 201; *Smith v. Surman*, 4 M. & R. 463; *Cason v. Cheely*, 6 Ga. 556; *Flint v. Corbitt*, 6 Daly, 430, citing *Bates v. Coster*, *Mead v. Case*; see *Smith v. New York R. R.*, 4 Keyes, 198.

Fitch. See, by way of analogy, *Atkinson v. Bell*, 8 B. & C. 277; *Maberly v. Sheppard*, 10 Bingh. 99.

(i) *Stephens v. Santee*, 51 Barb. 545.

(j) *Cooke v. Millard*, 5 Lans. 245; *Phipps v. McFarlan*, 3 Minn. 100.

(k) *Courtright v. Stewart*, 19 Barb. 455, doubting by this rule *Sewall v.*

See chapter on the Statute of Frauds, § 11; see *Law Rev. (English)*, vol. xxii. p. 175, 419 (A. D. 1855).

CHAPTER X.

DELIVERY AND ACCEPTANCE OF CHATTELS.

- § 258. The delivery and acceptance, exception of the Statute of Frauds generally, and applied to what subjects.
- § 259. Effect of acceptance. Where there is written evidence of the contract.
- § 260. Delivery and acceptance must be by some act. Promise to accept; conditional acceptance, etc.
- § 261. Acceptance, etc., sufficient by a joint act to put property under control of buyer, and with intent to vest right of possession; some general considerations.
- § 262. Delivery and acceptance, both essential.
- § 263. Buyer may refuse unreasonably; the effect of mere delivery, though to buyer's place, or one indicated by him.
- § 264. Examples of mere delivery insufficient to satisfy the Statute of Frauds.
- § 265. There must be delivery as well as acceptance.
- § 266. Other examples of necessity of both delivery and acceptance.
- § 267. Delivery sufficient at common law to pass title not necessarily sufficient under the Statute of Frauds.
- § 268. Acceptance, etc., sufficient to lay ground for action for goods sold and delivered.
- § 269. Refusal to accept, how soon to be made.
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- § 272. Special examples of insufficient delivery and acceptance.
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- § 276. No delivery and acceptance while anything remains to be done to ascertain the goods. Weight, measurement, and separation.
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- § 283. Examples of acceptance by an agent; sufficient and insufficient.
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- § 285. Carrier habitually employed. Examples of carrier's acceptance being sufficient.
- § 286. Carrier designated by the buyer.
- § 287. *Contra* to the last rule.
- § 288. Delivery must be under the contract.
- § 289. Delivery and acceptance must be with the assent of the other party.

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| <p>§ 290. Subsequent delivery and acceptance.</p> <p>§ 291. Precedent delivery and acceptance.</p> <p>§ 292. Past delivery and acceptance.</p> <p>§ 293. Sales by sample.</p> <p>§ 294. Examples of insufficient part delivery and acceptance.</p> <p>§ 295. Part delivery, etc., where several lots are sold together. Examples of entire contract.</p> <p>§ 296. Examples of transactions decided to be separate.</p> | <p>§ 297. Symbolic delivery and acceptance.</p> <p>§ 298. Examples of sufficient symbolic delivery, etc.</p> <p>§ 299. Examples of insufficient symbolic delivery, etc.</p> <p>§ 300. Delivery, etc., by orders generally and examples.</p> <p>§ 301. Examples of orders accepted.</p> <p>§ 302. Examples of orders not accepted.</p> <p>§ 303. The question of delivery, etc., is for the jury.</p> |
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§ 258. BY the terms of the 17th section of 29 Car. II., c. 3, the delivery and acceptance of chattels will make an oral sale of them as effectual as a written one. (a) Delivery of the goods is complete performance under the Statute. (b) The Supreme Court of the United States said: "The party relies upon a purchase and sale at which, so far as the evidence shows, she paid no money, relinquished no rights, released no debts, assumed no responsibility, and acquired no possession. The intent of the parties was not evidenced by the payment of the purchase-money, nor by the ascertainment of the price, . . . nor by a written memorandum between the parties, nor by any formal or decisive declaration before witnesses, nor by the delivery of the thing sold." (c) Where the evidence tended to prove an oral contract of sale of chattels, and a delivery thereunder, the Statute of Frauds is satisfied if

The delivery and acceptance exception of the Statute of Frauds generally, and applied to what subjects.

- (a) *Alexander v. Comber*, 1 H. Bl. 20; *Groves v. Buck*, 3 M. & S. 179; *Kelly v. Brooks*, 25 Ala. 527; *Sawyer v. Ware*, 36 Ala. 681; *Mayer v. Child*, 47 Cal. 144; *McTaggart v. Rose*, 14 Ind. 231; *Buckman v. Nash*, 3 Fairf. 474; *Donaldson v. Newman*, 9 Mo. App. 242; *Vincent v. Germond*, 11 Johns. 283; *Dennison v. Carnahan*, 1 E. D. Smith, 144; *Gray v. Payne*, 16 Barb. 277; *Van Woert v. Albany R. R.*, 1 N. Y. S. C. 256; *Baumgartner v. Fowler*, 19 Law
- Reports (Lowell), 381, S. C. N. Y.; *Cotterall v. Stevens*, 10 Wis. 425; *Nichols v. Mitchell*, 30 Wis. 331; see 5 Wait, Act. and Def. 579.
- (b) *Pinchon v. Chilcott*, 3 C. & P. 236; *Bowie v. Bowie*, 1 Md. 94; *Burchiel's Case*, 4 Ct. of Cl. 550; *Choat v. Wright*, 2 Dev. Law, 289; *Scouler v. Haley*, 8 U. C. Q. B. 257.
- (c) *Mahan v. United States*, 16 Wall. 143; 6 N. & H., 331; 8 N. & H., 143.

the case was made out.(d) In a Louisiana decision it was said that, in a common-law state, slaves being personal property can be given by parol if delivered, and a good title will vest.(e) In Lower Canada, where one has possession of a chattel, he can show orally in what character he holds; his possession is equivalent to a writing.(f) The effect of delivery and acceptance extends to a mortgage or pledge of chattels;(g) and is of special value in the case of an oral gift.(h) In a late Georgia case it was said that a statute of Georgia (Code, § 1593), providing that cotton and other products shall not be considered as the property of the buyer, or the ownership given up till fully paid for, although it may have been delivered into the possession of the buyer, does not affect the delivery and acceptance exception to the Statute of Frauds; it was passed merely as an additional protection to sellers of cotton, etc.(i) Where a contract of a sale of goods does not require payment until after a year, delivery and acceptance will satisfy the Statute of Frauds as regards both the "year" and the "chattels" sections.(j)

§ 259. But if there is a memorandum in existence its terms cannot be varied by oral evidence, though there have been delivery and acceptance.(k) If the effect of the oral evidence is not to contradict the writing, it is, however, admissible.(l) Where there is a writing, no delivery and acceptance or earnest is necessary.(m) An instruction to a jury that there must be an actual delivery of possession of chattels, or a bill

Effect of acceptance, etc., where there is written evidence of the contract.

(d) *Whaley v. Gale*, 12 No. West. Rep. 33, N. C. Mich.

(e) *Crawford v. Puckett*, 14 La. Ann. 639.

(f) *Lefebvre v. Bruneau*, 14 Low. Can. Jur. 268; see *Garfield v. Paris*, 96 U. S. 563.

(g) *Bank of Rochester v. Jones*, 4 Comst. 506; *Bardwell v. Roberts*, 66 Barb. 435.

(h) *Bowie v. Bowie*, 1 Md. 94; *Cornell v. Cornell*, 12 Hun, 313; *Maillot v. Wesley*, 11 La. Ann. 467; *Bogan v. Finley*, 19 La. Ann. 96.

(i) *Groover v. Warfield*, 50 Ga. 651.

(j) *Suggett v. Cason*, 26 Mo. 225.

(k) *Lamb v. Crafts*, 12 Metc. 355; see *Moore v. Campbell*, 23 L. J. Ex. 310.

(l) *Lockett v. Nicklin*, 2 Exch. 92; and see, *Jeffcott v. North British Co.*, Ir. Rep. 8 C. L. 19.

(m) *Franklin v. Long*, 7 G. & J. 407; but see *Sloan v. Scott*, 4 West. L. Jour. 5 (Fountain C. C. Ind.) See, however, *Smith v. Spackman*, 55 Miss. 653.

of sale is incorrect, as unqualified; as between the parties there may both at common law and under the 17th section of the Statute of Frauds be such a valid sale, without either actual delivery of possession or a bill of sale.(n)

§ 260. Acceptance and delivery must be by some act, and not by mere words.(o) In a Vermont case, it was said that "no acts of the party sought to be charged are proved. We are presented with a naked verbal agreement. In order to satisfy the Statute, where the property is not in the purchaser's possession, there must be something more than mere words. The purpose of the Statute was to prevent frauds and perjuries; but if nothing more is required than mere words, how is that purpose to be effectuated? Declarations as to acceptance and receipt in this case constituted a part of the contract, and are obnoxious to all the evils and every objection that it was the policy of the Statute to provide against."(p) A promise to accept is nothing.(q) There must be some unequivocal acts of acceptance, and actual receipt of the property.(r) Conduct, acts, and declarations are admissible to establish and determine the character of what is claimed to be delivery and acceptance.(s) A mere conversation about the storage of the goods with the seller is insufficient.(t) The acts of acceptance must be something more than merely what is involved in the contract itself.(u) A promise to accept is not an acceptance.(v) And though followed by delivery, if the

Delivery and acceptance must be by some act; promise to accept; conditional acceptance, etc.

(n) *Gough v. Edelen*, 5 Gill, 102.

(o) *Marvin v. Wallis*, 6 E. & B. 733; *S. C.*, sub nom. *Marvin v. Wallace*, 25 L. J. Q. B. 369; *Kaufman v. Stone*, 25 Ark. 346; *Gardet v. Belknap*, 1 Cal. 399; *Malone v. Plato*, 22 Cal. 103; *Bowers v. Anderson*, 49 Ga. 145; *Edwards v. Grand Trunk Railway*, 54 Maine, 111; *Scotten v. Sutler*, 37 Mich. 530; *Taylor v. Mueller*, 15 N. W. Rep. 413; 30 Minn., 343; *Bass v. Walsh*, 39 Mo. 198; *Shepherd v. Pressey*, 32 N. H. 55; *Finney v. Apgar*, 2 Vroom, 272; *Pitney v. Glens Falls Ins. Co.*, 61 Barb. 343-4; *Good v. Curtiss*, 31 How. Pr. 10;

Kellogg v. Witherhead, 6 N. Y. *supra*, 526; *Duplex Co. v. McGinness*, 1 City Ct. Rep. 438 (N. Y.).

(p) *Bassett v. Camp*, 54 Vt. 235.

(q) *Blanchard v. Trim*, 38 N. Y. (11 Tiff.) 227.

(r) *Harvey v. St. Louis Butch. Ass.*, 39 Mo. 217.

(s) *Garfield v. Paris*, 96 U. S. 563; See *Lefebvre v. Bruneau*, 14 Low. Can. Jur. 268.

(t) *Bailey v. Freeman*, 11 Johns. 223.

(u) *Shindler v. Houston*, 1 Comst. 264; *Alderton v. Buchoz*, 3 Mich. 326.

(v) *Shepherd v. Pressey*, 32 N. H. 49.

goods when delivered are refused.(w) An offer to deliver upon a condition which is refused is null.(x) So a conditional acceptance.(y) When the vendee had inquired of a third person if he had certain goods, and added that he, the vendee, had bought them, there is no acceptance.(z) In a New York case, it was said in a suit by a principal against his agent that, whether an oral permission to a vendee to retain possession of choses in action (previously in his hands for sale as an agent), as part of an oral contract by the owner to sell them to him, is a delivery of them within the Statute of Frauds, it is not necessary to decide. Such a sale would at least operate to revoke any power of selling previously given to such vendee as an agent, so as to destroy any previous fiduciary relation between him and the vendor, and leave the plaintiffs to whatever other remedy they might have.(a)

§ 261. The acceptance and delivery must be sufficient to place the property under the control of the vendee; and there must be delivery with intent to vest the right of possession as owner.(b) As has been said, "there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with an intention of taking to the possession as owner."(c) The vendor must deliver to the vendee with the intention of vesting the right of possession in him, and to establish the

Acceptance, etc., sufficient by a joint act to put property under control of buyer, and with intent to vest right of possession. Some general considerations.

(w) *Ham v. Van Orden*, 4 Hun, 710.

(x) *Bailey v. Ogden*, 3 Johns. 420; *Messer v. Woodman*, 22 N. H. 181.

(y) *Cammeyer v. The Churches*, 2 Sandf. Ch. 246; *Messer v. Woodman*, *supra*.

(z) *Alderton v. Buchoz*, 3 Mich. 322.

(a) *Swift v. Wylie*, 5 Roberts. 686; see *Means v. Williamson*, 37 Me. 557; an acceptance by mere word of mouth was upheld.

(b) *Safford v. McDonough*, 120 Mass. 291; *Carver v. Lane*, 4 E. D. Sm. 170; *Brand v. Focht*, 1 Abb. App. Dec. 185;

Edwards v. Grand Trunk R. W. Co., 54 Me. 111; *Washington Ice Co. v. Webster*, 62 Me. 355; *Gardet v. Belknap*, 1 Cal. 399; *Johnson v. Watson*, 1 Ga. 351; *Daley v. Marks*, *Berton (N. B.)*, 346.

(c) *Phillips v. Bistolli*, 2 B. & C. 513; *Messer v. Woodman*, 22 N. H. 181; *Baker v. Cuyler*, 12 Barb. 668; *Jones v. Mech. Bank*, 29 Md. 293; *Hewes v. Jordan*, 39 Md. 479; *Taylor v. Mueller*, 15 N. W. Rep. 413; 30 Minn., 343.

further acceptance, the vendee must take possession with the intention thereby of becoming owner.(d) In a Missouri decision it was said that this provision of the Statute implies, it is said, a delivery of the thing sold on the part of the debtor, and an acceptance of it by the buyer, with an intention on the one side to part with, and on the other to accept the ownership of it; and it is not enough that the mere natural, actual, corporeal possession should be changed, but there must be a change of the civil possession, which is a holding of the thing with the design of keeping it as owner.(e) So there must be a delivery by the sellers, and some unequivocal acts of ownership or control of the goods on the part of the purchaser.(f) The delivery must be accompanied by an acceptance by the buyer with a view to the immediate possession as owner.(g) There must be such acceptance by him as to show that he considers himself owner, and bound to take the goods.(h) The word "accept" means some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as reasonably to lead the seller to suppose so.(i) To satisfy the Statute of Frauds the goods must be delivered and accepted, and intended to become the buyer's property.(j) The acts of the parties must have been of a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer.(k) The buyer must receive and retain the articles delivered, intending thereby to assume the title to them to constitute the acceptance mentioned in the Statute of Frauds.(l) The mere receipt is not a compliance with the Statute of Frauds. There must be some act or conduct on the part of the buyer, indicating and mani-

(d) *Fawcett v. Glossop*, 69 L. T. (Wakefield C. C.) 287.

(e) *Cunningham v. Ashbrook*, 20 Mo. 558.

(f) *Safford v. McDonough*, 120 Mass. 291.

(g) *Maberly v. Sheppard*, 10 Bing. 100; *Phillips v. Bistolli*, 2 B. & C. 513; *Brand v. Focht*, 1 Abb. App. Dec. 185; *Jones v. Mech. Bank*, 29 Md. 293; *Hewes v. Jordan*, 39 id. 478.

(h) *Barnett v. Farley*, 11 L. T. N. S. 107; 12 W. R. 748.

(i) *Bowes v. Pontifex*, 3 F. & F. 743.

(j) *Phillips v. Ocmulgee Mills*, 55 Ga. 636.

(k) *Marsh v. Rouse*, 44 N. Y. 646.

(l) *Rodgers v. Phillips*, 40 N. Y. (1 Hand) 523.

festing his intention on receiving them to accept them absolutely and unconditionally in execution and full performance of the contract of sale.(m) The acceptance must be with intention to perform the whole contract, and assert the buyer's ownership under it.(n) Delivery and acceptance may be sufficient if goods are taken with the intention of keeping them if up to sample, and they are in fact up to sample.(o) It is a question of intention to be gathered from the facts, whether there has been delivery and acceptance.(p) It is a question for the jury whether the buyer has dealt with the property as his own.(q) Acts of ownership are evidence of acceptance, but acceptance is a fact, and can be shown by other evidence.(r) Putting goods at the point of delivery on the seller's land is insufficient.(s)

§ 262. There must be both delivery and acceptance;(t) and both parties must partake in the same act.(u) Though some doubt was perhaps at one time felt on the point in England, the rule now is that there must be both delivery and acceptance.(v) And it has been said that certainly unless accept means no more than received, as surely it must, for otherwise the word deliver would of itself have sufficed, acceptance must mean some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as reasonably to lead the seller to suppose so.(w) To constitute acceptance two acts are neces-

Delivery
and accep-
tance both
essential.

(m) *Stone v. Browning*, 68 N. Y. 600, citing cases.

(n) *Townsend v. Hargraves*, 118 Mass. 332; *Atherton v. Newhall*, 123 Mass. 142.

(o) *Bacon v. Eccles*, 43 Wis. 233, citing *Smith v. Stoller*, 26 Wis. 671; see *Remick v. Sandford*, 120 Mass. 315; 118 id. 107.

(p) *Phillips v. Ocmulgee Mills*, 55 Ga. 636.

(q) *Baines v. Jevons*, 7 C. & P. 289.

(r) *Pinkham v. Mattox*, 53 N. H. 602.

(s) *Pike v. Vaughn*, 39 Wis. 503.

(t) *Maberly v. Sheppard*, 10 Bing-
ham, 100; *Tempest v. Fitzgerald*, 3
Barnwell & Alderson, 682; *Jones v.*

Mech. Bank, 29 Md. 293; *Knight v. Mann*, 118 Mass. 143; S. C., 120 Mass. 219; *Messer v. Woodman*, 22 N. H. 181; *Gilman v. Hill*, 36 N. H. 317; *Baker v. Cuyler*, 12 Barb. 668; *Pitney v. Glens Falls Ins. Co.*, 61 id. 343; *Marcus v. Barnard*, 4 Rob. Sup. Ct. 219; *Brand v. Focht*, 1 Abb. App. Dec. 185; *Smith v. New York Cent. R. R.*, 4 Abb. App. Dec. 266; 4 Keyes, 180; *Rodgers v. Phillips*, 40 N. Y. (1 Hand) 523; *Caulkins v. Hillman*, 47 id. 449; *Hawley v. Keeler*, 53 id. 119; *Stone v. Browning*, 68 id. 600.

(u) *Safford v. McDonough*, 120 Mass. 291.

(v) *Baldey v. Parker*, 2 B. & C. 40.

(w) *Bowes v. Pontifex*, 3 F. & F. 743.

sary, the goods must be accepted and actually received.(x) No act of the seller will amount to acceptance.(y) In a New York case it was said that a mere delivery of the property contracted to be sold by the terms of the void contract has been held to be insufficient to vest the title to it in or place it at the risk of the vendee. But beyond that it became necessary, under the rule adopted by the statute, that some part of the property should not only be delivered and received by the vendee, but that it should also be accepted by him. This acceptance of it involved something more than the act of the vendor in the delivery. It required that the vendee should also act, and that his act should be of such a nature as to indicate that he received and accepted the goods delivered as his property. He must receive and retain the articles delivered, intending thereby to assume the title to them to constitute the acceptance mentioned in the Statute.(z) The Statute of Frauds of Iowa has the word "deliver" only, and not the word "accept."(a)

§ 263. Mere delivery without acceptance is insufficient.(b) That the buyer refuses unreasonably to accept makes no difference.(c) As will be seen later, the right to refuse to accept remains though the goods are sent to the buyer or to a place named by him.(d) "Acceptance is taking to the goods and

Buyer may refuse unreasonably; the effect of mere delivery, though to

(x) *Kaufman v. Stone*, 25 Ark. 346; see *Strong v. Dodds*, 47 Vt. 354.

(y) *Shepherd v. Pressey*, 32 N. H. 49.

(z) *Rodgers v. Phillips*, 40 N. Y. (1 Hand) 523.

(a) *Bullock v. Tschergi*, 13 Fed. Rep. 345, C. C. D. Ia., saying that acceptance was a mental act, and that the danger of fraud was sufficiently guarded against by the word "deliver." In *Simpson v. Krundick*, 28 Minn. 353, it was said that there might be receipt without any acceptance, and acceptance without any receipt, citing *Blackb. Sales*, 22, and giving as an instance of the former a sale by sample, and as an instance of accep-

tance without receipt, the sale of a specific lot of goods identified by the bargain itself, citing *Cusack v. Robinson*, and *Cross v. O'Donnell* as to this last; it may be questioned whether there is any real value in the points thus made.

(b) *Caulkins v. Hellman*, 47 N. Y. 449; *Heermance v. Taylor*, 14 Hun, 149; *Gorham v. Fisher*, 30 Vt. 428.

(c) *Gibbs v. Benjamin*, 45 Vt. 130; *Cunliffe v. Harrison*, 6 Exch. 905; *Remick v. Sanford*, 120 Mass. 315; 118 id. 107; *Stone v. Browning*, 68 N. Y. 600.

(d) *Hart v. Bush*, E. B. & E. 498; 27 L. J. Q. B., 272; *Grover v. Cameron*, 6

buyer's
place or one
indicated
by him.

approving them," said Judge Patteson.(e) Delivery to a buyer when *non compos mentis* is insufficient.(f) A promise to accept goods followed by a delivery at vendee's house, is not an acceptance if the vendee when he knows that the goods were so delivered, refuses to take them.(g)

§ 264. Mere delivery at the buyer's premises is not sufficient; where the goods by the buyer's order were prepared, measured, and put on the seller's wharf for a third person to take away, who, however, received no advices from the buyer.(h) Where the seller, at the buyer's order, surveyed the boards sold and marked them with the buyer's name, and gave orders to have them shipped as the buyer had directed, and the buyer had procured no one to receive or ship the goods, there was no sufficient delivery and acceptance.(i) Putting the goods in the buyer's shed is insufficient.(j) So where wood was ordered by the buyer's agent, and the seller hauled it to a place on the buyer's property, but nothing was done by the buyer.(k) Where barley was sold by sample, and was sent to an elevator; the defendant procured from the plaintiff a delivery order, and the cars with the grain were sent to the defendants' warehouse, and the grain examined by the defendants and sent back as not up to sample, the jury found that the place of delivery was the defendants' warehouse and not the elevator; the cars were left on the track, and the grain in them. There was held to be no delivery and acceptance to satisfy the Statute of Frauds.(l) So where the seller deposited the goods in the highway at a place desig-

U. C. K. B. O. S. 197; *Edwards v. Grand Trunk R. W.*, 54 Me. 111; *Delventhal v. Jones*, 53 Mo. 462; *Finney v. Apgar*, 2 Vroom. 270; *Gilman v. Hill*, 36 N. H. 317; *Jackson v. Covert*, 5 Wend. 141.

(e) *Sadler v. Whitmore*, 5 Jur. 315.

(f) *Matthieson v. McMahon*, 38 N. J. Law, 540.

(g) *Ham v. Van Orden*, 4 Hun, 710, citing cases.

(h) *Cooke v. Millard*, 5 Lans. 245.

(i) *Howard v. Borden*, 13 Allen, 299; see *Jackson v. Covert*, 5 Wend. 141.

(j) *Gilman v. Hill*, 36 N. H. 317.

(k) *Edwards v. Grand Trunk R. W.*, 54 Me. 111.

(l) *Taylor v. Mueller*, 15 N. W. Rep. 413; 30 Minn., 343; distinguishing *Morton v. Tibbett* as a case of sale.

nated by the buyer, and the latter was informed of the fact, and promised to pay for the articles.^(m) Merely bringing the goods to a place indicated in the agreement of sale is insufficient.⁽ⁿ⁾ But it has been held that while such a delivery as a general rule is not sufficient, yet if, as actually made, it complied with the contract between the parties, the Statute of Frauds would be satisfied.^(o) So if it was agreed that the goods were to be taken by the vendor to a place specified, it does not necessarily follow that the title did not pass so far as the Statute of Frauds is concerned; the intention of the parties was a fact for the jury.^(p) But it would seem that these two decisions are open to the criticism that, instead of finding the contract from the nature of the acceptance, they first determine the nature of the acceptance from the oral proof of the contract, and then having proved the acceptance from the contract, proceed to prove the contract from the acceptance.^(p¹)

§ 265. There must be delivery as well as acceptance,^(q) and with the seller's assent.^(r) Where there has been no delivery, there is no opportunity to the buyer to exercise his right of examination.^(s) Where the

There must be delivery, as well as acceptance.

(m) *Finney v. Apgar*, 2 Vroom, 268; see *Nicholls v. Plume*, 1 C. & P. 272; *Montgomery v. Ricker*, 43 Vt. 167.

(n) *Hart v. Bush*, E. B. & E. 496; *Shepherd v. Pressey*, 32 N. H. 55; *Delventhal v. Jones*, 53 Mo. 462; see *Grover v. Cameron*, 6 U. C. K. B. O. S. 197; *Harvey v. St. Louis Butchers' Asso.*, 39 Mo. 217.

(o) *Anderson v. Hodgson*, 5 Price, 630.

(p) *Dyer v. Libby*, 61 Me. 45; see *Finney v. Apgar*, 2 Vroom, 272.

(p¹) See *Grimes v. Van Vechten*, 20 Mich. 413.

(q) *Clark v. Tucker*, 2 Sandf. 157, as to acceptance before delivery see § 291.

(r) And thus where the buyer of certain felled timber sent his agent to mark the portions he intended to buy, i. e., the trunks; the seller then cut off the branches and sent the trunks

to the buyer, this being the course of dealing between the parties; the seller became bankrupt, and the buyer sent his agent to the seller's land to dress the marked timber and deliver it to him, the buyer; it was held that this latter act had no effect in transferring the title in the trees, that there was not delivery and acceptance, and that the trees passed to the seller's assignee in bankruptcy; *Acraman v. Morrice*, 8 C. B. 449. It would seem that this case did not depend upon a question of the Statute of Frauds, because there was a payment which should have satisfied the latter; but that there was not the preparation on the seller's part which was necessary even at common law to pass the title.

(s) *Knight v. Mann*, 120 Mass. 219; 118 id. 143.

goods had already been in the hands of the buyer before the sale, as where he was the tenant of the seller, or where there was a resale between the parties,^(t) there may be acceptance or taking to the goods on the part of the buyer, so as to satisfy the Statute of Frauds, though the act of delivery can scarcely be said to have taken place.^(u) Thus, where a sale of a house as personal property was made to the person then living in it, it was held in a Wisconsin case that the contract was good, though there was no writing or part payment, as there was acceptance and delivery, the law not requiring the ceremony of a moving out and in again on the part of the vendee; but this ruling is not to be accepted without much consideration.^(v)

§ 266. The necessity of delivery, as well as of acceptance, comes up in a somewhat curious way in those cases which are affected both by the Statute of Frauds and a prohibitory liquor law. Thus, where the law of Iowa prohibited the sale of intoxicating liquors, and the Statute of Frauds of Iowa made a verbal sale of goods non-enforceable, and the goods were shipped in Wisconsin by rail to the defendant in Iowa, who accepted them, it was held that the acceptance did not relate back to validate the delivery in Wisconsin so as to make the contract a Wisconsin contract; and this, though the contract was invalid, and only made valid by the delivery and acceptance, and the only act in Iowa was the acceptance, the delivery was nothing; the contract was originally made in Iowa, and there the acceptance took place.^(w)

§ 267. Delivery sufficient to pass title at common law is not sufficient without acceptance to satisfy the Statute of Frauds.^(x)

(t) See *Salter v. Woollams*, 2 M. & G. 655, see notes; and *Mayfield v. Wadsley*, 3 B. & C. 361; 5 D. & R., 224; see § 270 n. (g); *Taylor v. Wakefield*, 6 E. & B. 769; § 270 n. (k).

(u) *Couillard v. Johnson*, 24 Wis. 540; see *Smith v. Bryan*, 5 Md. 141, for the converse case, where under the original sale the buyer had never taken

manual possession of the goods, which he resold to the original seller.

(v) *Snider v. Thrall*, 56 Wis. 676.

(w) *Keiwert v. Meyer*, 62 Ind. 587; see *Garfield v. Paris*, 96 U. S. 563.

(x) *Lloyd v. Wright*, 25 Ga. 217; *Audenreid v. Randall*, 3 Cliff. 103; *Bass v. Walsh*, 39 Mo. 198; *Rodgers v. Phillips*, 40 N. Y. (1 Hand) 523.

In order to constitute an acceptance and receipt under the Statute of Frauds, it is not enough that the title in the goods has vested in the buyer, but he must have assumed the legal possession of them.^(y) In a Missouri decision it was said that although at common law consent alone was sufficient to constitute a valid sale, the Statute of Frauds has now intervened, and other formalities are prescribed which must be observed, or what was before a valid transfer of property is now of no validity. The Statute beginning where the common law stopped requires some one of these solemnities to be added to the transaction before it shall be considered as complete, so as to effect a change of ownership; and the matter here relied upon, as the Statute evidence of the completion of the contract was the change of possession.^(z) In a case in 3 Clifford the court said: "The proposition of the defendant is where manual possession of the goods is not taken by the buyer, there must be something more than would be sufficient to constitute a delivery and to change the property at common law, and if by that it is only meant that a sale may be valid at common law as between the parties, and the contract still be within the Statute of Frauds, the proposition may well be admitted."^(a)

Delivery sufficient at common law to pass title not necessarily sufficient under the Statute of Frauds.

§ 268. The acceptance necessary to lay ground for an action for goods sold and delivered and that required by the Statute of Frauds are the same.^(b); though a part delivery and acceptance may satisfy the Statute of Frauds, and yet no action for goods sold and delivered lie.^(c) Where the case was taken out of

Acceptance, etc., sufficient to lay ground for action for goods sold and delivered.

(y) *Rodgers v. Jones*, 129 Mass. 420. *Kane v. Drake*, 27 Ind. 31; *Haydon v.*

(z) *Cunningham v. Ashbrook*, 20 Mo. 558. In Mississippi it was held that delivery of chattels was not necessary to pass title as the 17th section of the Statute of Frauds was not in force in that state; *Ingersoll v. Kendall*, 13 Sm. & M. 617; see *Kaufman v. Stone*, 25 Ark. 346; *Hurlbut v. Simpson*, 3 Ired. 236. But as to necessity of delivery to pass title at common law, see

Crawford, 3 U. C. K. B. O. S. 588.

(a) *Audenreid v. Randall*, 3 Cliff. 100; see *Safford (Ex p.)*, *Downing (Re)*, 2 Low. 564.

(b) *Clark v. Wright*, 11 Ir. C. L. 405, citing cases; see *Cunliffe v. Harrison*, 6 Exch. 905; 3 Wait, Act. and Def., 526.

(c) *Elliott v. Heginbotham*, 2 C. & K. 546; and so *Patteson, J.*, observed

the Statute of Frauds by part payment, and though the vendor refused to deliver without payment, it was held that the price having been agreed upon, and the vendee having nothing against the chattel except the price, an action lay for goods bargained and sold.^(d)

§ 269. The refusal to accept goods which have been delivered should be promptly made.^(e) The buyer has a reasonable time in which to examine his purchase.^(f) And so where the delivery has been by bill of lading.^(g) The non-communication to the seller by the buyer of his refusal is a point against the latter.^(h) Though a refusal to accept should be prompt, a usage allowing a testing which would occupy some time was recognized.⁽ⁱ⁾ For examples of a delay considered as not working as an acceptance, see the note.^(j) Whether delay in sending back a bill of lading taken with other circumstances, such as negotiations between the parties, amounts to delivery and acceptance, so as to satisfy the Statute of Frauds, is a question of fact for the jury.^(k) The retention of goods bought at auction for seven days will justify a jury in finding an acceptance.^(l) For examples of such delay as will cause the buyer's acts to amount to an acceptance, see the note.^(m)

§ 270. That the buyer may accept so as to satisfy the Statute of Frauds, and yet leave the goods bought in the possession of

in *Curtis v. Pugh*, 10 A. & Ell., N. S. 113; see *Anderson v. Scott*, 1 Campb. 235, n.

^(d) *Elliott v. Pybus*, 10 Bingham, 516, citing cases.

^(e) *Smith v. Hudson*, 6 B. & S. 445; 34 L. J. Q. B., 145; *Currie v. Anderson*, 2 E. & E. 599; 29 L. J. Q. B., 90; *Treadwell v. Reynolds*, 39 Conn. 34; *Gaslin v. Pinney*, 24 Minn. 323; *Hayman v. American Sponge Co.*, 6 N. Y. Weekly Dig. 358; *Spencer v. Hale*, 30 Vt. 317.

^(f) *Bowes v. Pontifex*, 3 F. & F. 743; see *Curtis v. Pugh*, 10 A. & Ell., N. S. 113.

^(g) *Rodgers v. Phillips*, 40 N. Y. (1 Hand) 523, citing cases.

^(h) *Norman v. Phillips*, 14 M. & W. 277.

⁽ⁱ⁾ *Coleman v. Gibson*, 1 M. & Rob. 169.

^(j) *Rickard v. Moore*, 38 L. T. Rep., N. S. 841; *Nicholls v. Plume*, 1 C. & P. 272; *Cunliffe v. Harrison*, 6 Exch. 905.

^(k) *Borrowdale v. Bosworth*, 99 Mass. 381.

^(l) *Service v. Walker*, 3 Vict. L. R. Law, 185.

^(m) *Baylis v. Lundy*, 4 L. T., N. S. 176 (K. B.); *O'Brien v. Barker*, 4 New Zeal. Jur., N. S. 64.

the seller, is possible; but in such a case it is generally very difficult to establish the line of demarcation which separates those transactions, in which the delivery and acceptance is considered sufficient, and those in which it is not. It has been said that to make the seller bailee for the buyer there must be a new agreement.⁽ⁿ⁾ The following examples show a sufficient delivery and acceptance. Thus, it has been held that the seller may become bailee for the buyer.^(o) And it has been said that it is true there may be cases in which the goods remain in the possession of the vendor, and yet may have been accepted and received by the vendee. But in such cases the vendor holds possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed.^(p) Where there was evidence of the sale of a horse, and that immediately upon the bargain being made the vendee lent the horse to the vendor, it was held to be correct to leave it to the jury to say whether the sale had been completed, though the vendor remained in possession all the time.^(q) In an English decision, given not long after that just referred to, the court said: "In the present case the defendant purchases goods of the plaintiffs, and hearing from them that they had before consigned goods to Messrs. Hanson & Co., at Constantinople, desires the plaintiffs to make out the bill of lading to that firm. The defendant also sent goods of his own to the plaintiffs' warehouse, which were, by his direction, sent down to the same ship with the goods purchased by him of the plaintiffs. All the goods were put on board together, and in the bill of lading those other goods of the defendant were included with the goods the subject of the present action. The plaintiffs paid the freight in the first instance, and the defendant repaid them, and thereupon received from them the bill of lading."^(r) Where by the custom of trade goods sold remain with the

Examples of sufficient compliance with the Statute of Frauds—seller holding as bailee for the buyer.

(n) *Smith v. Bouck*, 33 Wis. 25, S. C., sub nom. *Wallace*, 25 L. J. Q. B. 369, relying on *Elmore v. Stone*. See citing cases.

(o) *Janvrin v. Maxwell*, 23 Wis. 53.

(p) *Safford v. McDonough*, 120 Mass. 291, citing cases.

(q) *Marvin v. Wallis*, 6 E. & B. 733 ;

(r) *Currie v. Anderson*, 2 E. & E.

599 ; 29 L. J. Q. B., 90.

seller, by way of pledge for the price, the Statute of Frauds may be satisfied; in the particular case there was a part payment.(s)

There is a distinction to be made where the seller, though retaining the goods, put them in a place separate from his other property, and upon this ground went the much-criticized case of *Elmore v. Stone*. There the plaintiff having sold a horse by parol moved him, at the defendant's direction, from his sales-stable to his livery stable, and it was held sufficient delivery and acceptance to satisfy the Statute of Frauds.(t) So where the defendant by his agent bought a billiard-table from the plaintiff, which table was then standing in a room of the plaintiff's premises, it was held that taking the table down, and putting it away in another room of the same building till defendant should call for it, was sufficient acceptance and delivery.(u) In a decision in the Exchequer Chamber reversing the Exchequer, it was held that, under the following circumstances, there was evidence for the jury of acceptance and delivery: the sellers had a bonded warehouse to which both the plaintiffs, the sellers, and the customs officers had keys, and where the sellers kept goods belonging to third persons as well as their own; the goods in suit had been sold to the defendant by the plaintiffs' traveller.(v) Where goods were orally sold by the plaintiff to the defendant, and were removed to a warehouse belonging to a third person, and which was used by the defendant, and the goods were wrapped in coverings belonging to the latter, there was sufficient delivery and acceptance.(w) The following are some further examples of sufficient acceptance: Thus, where the goods sold were moved to another part of the seller's store, and stored for the buyer's use.(x) So where this was done, and an entry of the sale was made by the seller in his book, and the buyer had sold to a third person.(y) So where the seller entered

(s) *Moffatt (Ex p.)*, *Tate (Re)*, 2 M. D. & De G. 176.

(t) 1 Taunt., 460; see *Bullard v. Waite*, 16 Gray, 57; *Shepherd v. Pressey*, 32 N. H. 49.

(u) *Stewart v. Laborde*, 1 Ril. (S. Car.) Dig. 360.

(v) *Castle v. Sworder*, 4 L. T., N. S., 868; S. C. below, 5 H. & N., 285; 29 L. J. Exch., 237.

(w) *Dodsley v. Varley*, 12 A. & Ell. 633.

(x) *Janvrin v. Maxwell*, 23 Wis. 51.

(y) *Wylie v. Kelly*, 41 Barb. 598.

the sale in his account with the buyer, the latter went through the seller's store calling off the goods, and the seller offered to the buyer the key of his store where the goods were, who declined it because the store was not insured, and the seller then directed his clerk to keep the key for the vendee, it was held that there was enough evidence of delivery and acceptance to go to the jury.(z) So where the seller held the goods at his store at the buyer's risk, and the latter removed some which he returned.(a) In a Maine case the rule was pushed to an extreme, and a sale held sufficient where the vendor kept the chaise sold till a vendee could build a shed for it, as the vendee could at any time take possession of it; the property was delivered, though the vendor kept it as a favor to the vendee. The only loop on which the theory of delivery could be hung was that the chaise was in a stable attached to the plaintiff's house, where the defendant could get it whenever he might want it; nothing was done, though by words the sale was concluded.(b) Where, in a replevin, the evidence showed an

(z) *Gray v. Davis*, 10 N. Y. 285.

(a) *Jackson v. Watts*, 1 McCord, 298.

In a case in 2 Lowell it was said, that "the single question in this case is, whether the goods had been accepted and received by Downing within the meaning of the Statute of Frauds. They had been weighed in his presence, and the precise hides agreed on, and the shrinkage ascertained. At his request, though whether in his presence or not is not quite clear, they had been set apart from all other goods, and marked with his name, and he was to take them when he pleased to send his carrier for them. No delivery could be more complete unless they had come into his personal possession, and I do not understand it to be denied that, at common law, the property would have passed.

"The cases are many where a sale, or a mere offer to sell, or a request by the vendee to the vendor to sell on his account, and various other acts of own-

ership, have been held sufficient for that purpose, though the goods remained in the actual possession of the vendor or of a middle-man."

In this case the seller's general insurance was agreed to cover these goods for the buyer's benefit, the goods remaining with the seller; this was evidence for the jury of acceptance; (*Ex parte*) Safford, (*Re*) Downing, 2 Low. 564.

(b) *Means v. Williamson*, 37 Me. 557. The two following cases, while like this last, have a better support on their facts. Thus, in *Wright v. Percival*, 8 L. J. Q. B. 258, it was held that (to quote the syllabus) "the defendant having agreed to buy a carriage of the plaintiffs, came after it was finished to the plaintiffs' manufactory, bringing with her a cover for the hind seat and a set of traces which the carriage had been previously made to fit. One of the plaintiffs said the carriage was complete; the defendant got into it,

agreement on Saturday, whereby two horses were exchanged, and as part of the consideration a debt of fifteen dollars owed by the defendant to the plaintiff was discharged; the defendant was authorized to take the horse in suit which was at the plaintiff's stable; the next day, Sunday, the defendant took the horse; the discharge of the debt was held to have taken place on Saturday; and even if the delivery and acceptance did not occur till Sunday, the latter was not invalid, because occurring on Sunday.^(c) Where the cattle sold were separated from those of the vendor, marked with the vendee's mark, and put into a separate inclosure, a question of sufficient accep-

and said it was a very nice one. The defendant then desired the plaintiff to order post horses to take it home, stating that she would call at half-past four in the afternoon; she added that she had brought a cover to put over the hind seat, and directed that it should be put over twice doubled. The cover was accordingly put over the seat in her presence and agreeably to her direction. The afternoon having proved wet, at five o'clock the defendant came to the plaintiffs, and stated her intention, owing to the badness of weather, not to take the carriage home that evening. The defendant afterward refused to pay the price demanded by the plaintiffs, and did not take the carriage away." It was held that these facts constituted a sufficient acceptance to satisfy the Statute of Frauds. In *Beaumont v. Brengeri*, 5 C. B. 315, Coltman, J., said, "that under the evidence, the seller held the chattel sold as warehouse-keeper for the buyer; it was proved," he said, "that the defendant had seen the carriage, and had had alterations made in it, and had expressed his intention to use it a few times before embarking it, so that it might pass as a second-hand carriage; and that, at his request, it was placed

by the plaintiff in his back shop, where it stood at the disposal of the defendant. It was further proved that, on Saturday, the 14th of November, the defendant called at the plaintiff's shop, and desired that a horse might be hired for him, and that the carriage should be sent to his house on the following day (Sunday), which was accordingly done. In considering whether the plaintiff had at this time agreed to hold the carriage as the defendant's agent, we may look at what took place on the Sunday. Is it reasonable to suppose that the plaintiff would have allowed the carriage to be used, which would have reduced it to the condition of a second-hand article if it had not been well understood between the parties that he had ceased to be the owner." Judge Maule also thought that the alteration made in the carriage and the use of it by the buyer showed an acceptance. See *Webster v. Bailey*, 40 Mich. 642, where the owner of the carriage borrowed it to drive home, and *semble* the delivery and acceptance was sufficient.

(c) *Peake v. Conlan*, 43 Ia. 298; see opinion of Maule, J., in *Beaumont v. Brengeri*, 5 C. B. 315.

tance arose for the jury.(d) *Seemle*, that under the following circumstances there was evidence of sufficient delivery and acceptance, it having been agreed that the buyer should take the cattle from seller's land as he needed them, and seller having at the buyer's request twice moved the cattle to a particular point, on his, seller's, land.(e) Where the buyer of goods had them examined, put into good order, and indicated those which were in a worthless condition (which the seller took away) the delivery and acceptance was held to be sufficient; there was, however, perhaps, a transfer into the buyer's possession of part which might validate the sale of the rest.(f) Where hay was sold for rent, and the tenant gave a written acknowledgment that the hay was the landlord's and agreed that it should remain on the land a certain time, this as between the landlord who sold and the purchaser, was held a complete delivery, notwithstanding that afterwards the tenant would not give up the hay. *Seemle* the vendee could have trover against the tenant and the Statute of Frauds was satisfied.(g) Where the seller permitted the buyer, the defendant, to make certain trees into timber, it was held in the Common Pleas of Upper Canada, that the Statute of Frauds was satisfied, though the timber was not removed from the seller's ground.(h) So, where the seller permitted the buyer to measure

(d) *Rappleye v. Adey*, 1 Th. & C. 126.

(e) *Bissell v. Balcom*, 39 N. Y. (12 Tiff.) 281, reversing 40 Barb. 98, citing *Elmore v. Stone* and *Marvin v. Wallace*. See, also, *Green v. Merriam*, 28 Vt. 801. The following are some further examples of the sufficient delivery and acceptance of cattle sold: Thus in *Brown v. Hall*, 5 Lans. 179, Hall, the defendant, sold cattle to one Kinney, and on the following Monday, Kinney and Brown went to Hall's, and Kinney drove away ten cows, and paid for their keeping, and Brown agreed to be responsible to Hall for the keeping of the two; and Brown contracted with Hall to further feed the two for him for a few weeks, at seventy-five cents per

week, and Hall so fed them. And it was thought that Hall under this arrangement became Brown's bailee, and his possession Brown's possession. In *Kealy v. Tenant*, 13 Ir. C. L. 394, the court refused to nonsuit where the buyer left certain heifers bought by him in possession of his own man, though at the same place where they had stood before the sale; the cattle had also been branded with the buyer's initial by a third person who stood helping the sale.

(f) *Chase v. Willard*, 57 Me. 161.

(g) *Salter v. Woollams*, 2 M. & G. 655, see note. See *Mayfield v. Wadslay*, 3 B. & C. 361; 5 D. & R., 224.

(h) *McCarthy v. Oliver*, 14 U. C. C. P. 292.

timber, mark it with his initials, and expend money in having it squared.(i) Where the buyer brought a third person to look at the goods in suit, and offered to sell him, it is a question for the jury whether there was or not sufficient acceptance.(j) In a case in 6 Ellis & Blackburn, Erle, J., said that "wherever goods in the hands of a person as lessee or bailee, with a parol contract for the purchase of those goods, which is not yet binding, if the purchaser takes to the goods as such, and changes the character in which he holds them, it is an acceptance as against him:" Crompton, J., said, "when goods are sold by parol and nothing remains to be done before the delivery, if the goods are already in the hands of the vendee, he may take to them under the contract, and it is an acceptance and receipt by the authority of both parties."(k)

(i) *Cooper v. Bill*, 3 H. & C. 729.

(j) *Blenkinsop v. Clayton*, 7 Taunt. 598. Though such a mere offer without more is not enough, it was held in the Upper Canadian Queen's Bench, *Clarkson v. Noble*, 2 U. C. Q. B. 364, citing cases.

(k) *Taylor v. Wakefield*, 6 E. & B. 769, citing *Edan v. Dudfield* and *Marvin v. Wallis*. Where as in the case last given, the two parties reside on the same land, or where, as in *Salter v. Woolham*, *supra*, the buyer or seller is tenant of the other's land, the question is, perhaps, not so much whether there has been an acceptance as whether there has been a delivery, and it may be well to look at that head of this subject (§ 265); in another case, *Webster v. Anderson*, 42 Mich. 555, belonging to this category, Judge Cooley of the Supreme Court of Michigan gave the following decision:—

"The facts as found by the Circuit Judge, are that in October, 1877, Anderson was at work in Hooper's employ on a farm; that Hooper then owed him \$100; that Anderson requested Hooper to pay him; and it was agreed between them, that the latter should

transfer to him twenty hogs then on his place, with others, at the price of \$96, and that Anderson should receive them at that price; that the parties went where the hogs were, and those to be taken by Anderson were pointed out and specified, and Hooper charged Anderson the purchase price on account; that it was a part of the arrangement that the hogs should remain in the same pasture as before with the other hogs, and be fed and cared for by Anderson with the others, until the opportunity should be found for selling them. The whole agreement between the parties was oral.

"The circuit judge was of opinion that there was a sufficient transfer of possession of the property to constitute a delivery under the circumstances. We agree in this view. It was all delivery that could well have been made under the circumstances, without requiring Anderson to remove the hogs from the farm where he was employed, to some other place, where they would have been less in his possession than where they were; and for this there could have been no sufficient reason. The case is within the reason of *Adams*

Where the plaintiff having sold goods to F. and M., and being engaged in getting them ready, the goods came into the possession of the defendant; F. and M., in order to avoid a suit with the latter, resold by parol the goods to the plaintiff; it was held that the defendant could not object that this resale was within the Statute of Frauds, inasmuch as there was a doubt whether the goods had been separated and delivered so as to give a good title to F. and M., and that even if their title thereto was good, yet as the plaintiff was engaged in delivering the goods (logs) when the defendants took them, the possession as between the plaintiff and F. and M. was in the former, and therefore no further delivery to satisfy the Statute of Frauds was necessary or possible.^(l)

§ 271. The case of a resale by the buyer to the seller gives rise to special doubts. Thus, where the defendant had goods of the plaintiff in his hands, and it was ^{Resale.} agreed that he should sell them to pay a debt due by the plaintiff to the defendant, it was afterwards agreed that the latter should buy them himself at a price named, and he sold the goods, and delivered an account to the plaintiff, in which he debited himself with the sale, describing the goods, and adding "sold" and the price, but not saying to whom, it was held that this was sufficient evidence of delivery and acceptance to take the case to the jury.^(m) The defendant sold to the plaintiffs a quantity of tea, and agreed that if the plaintiffs, after trying to dispose of the same, had any left upon their hands at a certain date, he, the defendant, would repurchase it at an advance of ten cents per pound. The tea was delivered, and upon the defendant's refusal to buy back what was left on the plaintiffs' hands at the date named this action was brought for the breach. It was *held* that the whole agreement consisted of one conditional contract of sale and not of two contracts, and that the delivery of the tea by the defendant, therefore, satisfied the Statute of Frauds.⁽ⁿ⁾

Mining Co. v. Seuter, 26 Mich. 73.
The delivery was held to be good as
against a subsequent levy by the em-
ployer's creditor.

(m) *Edan v. Dudfield*, 1 A. & Ell., N. S., 305; 5 Jur., 317, citing *Elmore v. Stone* and other cases.

(n) *Lumsden v. Davis*, 1 Can. Law

(l) *Couillard v. Johnson*, 24 Wis. 540. Times, 206; 46 U. C. Q. B. 1.

§ 272. So much is the nature of an acceptance, one depending upon the inference to be drawn from facts generally doubtful, that it is scarcely a matter for surprise that the adjudicated cases should show every degree of apparent inconsistency. No rule can be framed which will not be dependent for all its value upon the mode in which it is applied. It seems best, therefore, a category having been given of transactions which were held to show a compliance with the Statute of Frauds, that the reader should have before him examples of such as do not amount to sufficient delivery and acceptance. No mere act of the seller, such as setting the goods aside, will alone be sufficient.^(o) So where a buyer agreed to take all the sides of leather of a certain thickness, which were not then set apart, but formed part of a large pile from which they were afterwards to be selected by the seller.^(p) So where one K. was to carry skins for defendants, which the latter had bought from the plaintiffs; and these were put in a separate place in the warehouse of the latter, and were to be sorted, and a different price paid for the different qualities, and K. sorted part, but not all; before the skins could be delivered two or three days' testing by the plaintiffs was necessary. K. came again, and was told that the skins were ready, and was asked as to when he would take them; before he sent his team a fire in the plaintiffs' premises destroyed the skins.^(q) Where the defendant bought several articles, each separately agreed on, and some were measured in the defendant's presence, some he marked with a pencil, and others he assisted in cutting from a larger bulk, the Statute of Frauds was held to apply.^(r) Where the agent of the plaintiff, the buyer, went to the residence of the seller, the defendant, and orally bought certain cotton not weighed at an estimated weight, to be corrected by actual weighing, the cotton was to remain with the seller at the buyer's risk, the seller was to deliver the cotton, and in a certain event to receive pay for his hauling, the delivery and

(o) *Shepherd v. Pressey*, 32 N. H. 49.

(q) *Rodgers v. Jones*, 129 Mass. 420.

(p) *Atherton v. Newhall*, 123 Mass.

(r) *Baldey v. Parker*, 2 B. & C. 40.

acceptance were held insufficient.(s) So where the goods were not delivered when sold, because the vendee said that he did not want them so soon; and the seller kept possession, but his agent separated and measured them.(t) Where the plaintiff made a wagon for the defendant, and the latter, while the wagon was in the possession of the former, employed a third person to put some iron work on it, and the vehicle, after this work was done, remained in the plaintiff's possession to be

(s) *Bowers v. Anderson*, 49 Ga. 145.

(t) *Howe v. Palmer*, 3 B. & Ald. 323, distinguishing *Chaplin v. Rogers* and *Elmore v. Stone*.

Where an insurer defended on the ground that the plaintiff, Pitney, had no insurable interest in the chattels insured, because before they were burned he had sold them to T., through the latter's agent B., the Supreme Court of New York said: "No more was shown on that subject than that the farm on which the wool was stored was rented to B. from the 1st of April preceding the fire, and he took possession on that day, jointly occupying the house with the plaintiff, however, until after the fire had happened. He was to look after the wool for T.; and it appears that on the afternoon before the fire he procured the key of the wool-room from Mrs. Pitney, who retained possession of it, proceeded with it to the room, unlocked the door, went in and looked at the wool, then locked the door again and returned the key to the person from whom he had obtained it. This was all he had to do with the wool, as the agent or representative of the purchaser; and it was obviously insufficient to constitute the acceptance of it, which is required by the authorities to satisfy the words of the Statute of Frauds. He did not, according to his own evidence, go to the wool-room to take possession of it for T., who had verbally promised to buy it, but sim-

ply to look at it. And the fact that he returned the key of the room to the plaintiff's wife, after he had looked at it, very satisfactorily shows that he did not regard himself as having it in his possession, or as having accepted it on account of the purchaser;" *Pitney v. Glen Falls Ins. Co.*, 61 Barb. 343.

The following example of insufficient delivery and acceptance is not without interest: In *Lillywhite v. Devereux*, 15 M. & W. 291, Lillywhite, the plaintiff, being yearly tenant to K., underlet house and furniture at a weekly rent to D. Lillywhite, anxious to get rid of the house at the end of the year, offered to sell his furniture to D. for £50; but D. said it was too much, and verbally agreed to take it at a valuation if K. would accept him as tenant instead of Lillywhite. The furniture was valued at £80, and D. refused to give it, and then offered £50. Before the expiration of the year Lillywhite's agent gave Devereux, executrix *de son tort* of D., the key, and told her he must settle with Lillywhite about the furniture. K. refused to accept D. as tenant. D. afterwards used the house and furniture, continually notifying Lillywhite to take the latter away; but D. finally sent it to a broker to be sold. This is an action by Lillywhite against the defendant, as executrix *de son tort* of D., to get the rent and the value of the furniture.

finished by him, it was held that the Statute of Frauds was not satisfied.^(u)

§ 273. The following are further examples of insufficient delivery and acceptance. Thus, where the buyer of oxen put his arm over one of them, said he would pay the price, and then lent them to the seller.^(v) So, where the defendant agreed by parol to buy certain cattle of the plaintiff standing in the latter's field; it was understood that the plaintiff should keep them till paid for; the plaintiff allowed the defendant's servant to feed the cattle with his, plaintiff's, hay.^(w) So, where a horse was orally sold, and some time afterwards the defendant, the buyer, called on the seller, tried the horse's paces, directed a change in its outfit, and asked the seller's son if he would keep the horse a little longer, and promised to send for it at a certain time, but before he did so the horse died.^(x) So, where a horse was orally sold, and by the agreement the plaintiff, the seller, kept it, had it medically treated, and at the end of twenty days it was put to grass with a third person in the seller's name, because the buyer did not wish to be known as owning a race-horse.^(y) So, the buyer of horses left them in the seller's field, stables, etc., till the former should send for them, and it had been agreed that they should be kept at his, the buyer's, expense and risk.^(z) So, *semble*, where the cattle sold were left with the seller, while the buyer made up his drove.^(a) So, where the buyer left certain pigs in the possession of the seller, and asked the latter's servant not to feed them for two days, at which time he would take them, which he never did.^(b) That the seller, at the buyer's direction, takes the goods sold to another locality to sell for the buyer is not of itself a delivery and acceptance.^(c)

(u) *Maberly v. Sheppard*, 10 Bing. 100.

(v) *Phillips v. Hunnewell*, 4 Greenl. 376.

(w) *Holmes v. Hoskins*, 9 Exch. 755, distinguishing *Elmore v. Stone*.

(x) *Tempest v. Fitzgerald*, 3 B. & Ald. 682.

(y) *Carter v. Toussaint*, 5 B. & Ald. 858.

(z) *Malone v. Plato*, 22 Cal. 103; *Kirby v. Johnson*, 22 Mo. 354.

(a) *Vincent v. Germond*, 11 Johns. 283.

(b) *Falls v. Miller*, 2 Cr. & Dix, 417; *Ir. Cir. C. Rep.*, 606.

(c) *Ely v. Ormsby*, 12 Barb. 571.

§ 274. The following are some general examples of such a taking to and dealing with the chattels on the buyer's part as amount to a delivery and acceptance sufficient to satisfy the Statute of Frauds. Thus, where the defendant received and partly (*semble*) paid for goods; then thinking them below sample he stored them at the sellers' risk, and wrote to the sellers, and, finally, after correspondence, said, unless instructed to the contrary, he would sell them at their risk; this he did, the sellers declining to take any action, and claiming the price; it was held that the defendant had no authority to sell the goods, and selling them in his own name, he was bound as by an acceptance.^(d) Where R., a debtor to both Jennings, the defendant, and Webster, the plaintiff, agreed with them to sell to Jennings certain staves for \$75, and that the latter should sell these, and out of the returns should pay Webster the amount of \$25 which R. owed him; R., under this agreement, said to Jennings "I deliver you the staves," which were ten miles off; Jennings took them and sold them. It was held that the delivery was sufficient, possession having been taken by the vendee.^(e) Where persons having a right to have goods sold, inspected, took and resold them, the delivery and acceptance is sufficient.^(f)

General examples of sufficient delivery and acceptance.

(d) *Chapman v. Morton*, 11 M. & W. 534.

(e) *Jennings v. Webster*, 7 Cow. 260. For an example of a new sale by the buyer making an acceptance, see *Thornton v. Charles*, 9 M. & W. 802.

(f) *Hill v. McDonald*, 17 Wis. 100; and, as to reselling, see *Wylie v. Kelly*, 41 Barb. 598; *Robinson v. Gordon*, 23 U. C. Q. B. 147; see, also, *M'Master v. Gordon*, 20 U. C. C. P. 19, in which the court said: "I have no hesitation in saying that I think a very strong case was made out at the trial against defendants, as having both received and accepted the goods, at all events, so as to let in evidence of the oral contract, and satisfy the Statute of Frauds."

"They received notice of the arrival

at the station, in Toronto, and an invoice describing all the pieces, and giving the price and number of yards. They contracted with parties for the sale of different portions. They leave them over three weeks at the station, and then take them to their warehouse and open them.

"Next day they write to Harvey, certainly not refusing to take them, but, on the contrary, saying they would give something handsome to be out of them; but there was one thing that they must have, that is the measurement allowance; and that some twelve or fourteen pieces or ends were sent which they did not buy, and could not accept. I cannot possibly read that letter, except as the declaration of par-

Where the buyer resold to a third person, who took away part of the goods, though against the direction and without the knowledge of the former, the original sale is taken out of the Statute of Frauds.(g) And where the plaintiffs, commission merchants of Paris, receiving from the defendants at Boston orders for silk and silk cravats, which the defendants ordered sent to W. & Co., at Havre, their, the defendants', agents; the plaintiffs ordered the goods of the manufacturers in Germany, who did not know the defendants in the matter; the manufacturers, at the plaintiffs' orders, sent the goods to W. at Havre, and sent the plaintiffs the invoices. Before the goods arrived at Havre the defendants directed the plaintiffs to instruct W. to change the marks on the boxes, which W. did, and shipped the goods, and sent the defendants the bills of lading; the defendants expecting both cases by one ship failed to inquire for the other case, which arrived in Boston, and was destroyed by the burning of the warehouse where it was stored. It was held that the plaintiff might recover the price of the goods.(h) If the buyer so deal with the goods as to change their character he is liable for their price, as directing barley to be malted.(i) It is a sufficient delivery and accept-

ties that they had to take them, and were sorry for it, and claiming a trade allowance on the measurement.

"Then, after some correspondence with Harvey, on the 28th of January, the defendant wrote: 'I decline these tweeds now altogether.'

"All these circumstances put together would be fit to submit to a jury as evidence of acceptance."

(g) *Chaplin v. Rogers*, 1 East, 194. Where the buyers carelessly failed to take the goods which were afterwards lost or destroyed, they may be liable for the price as where goods were, through the negligence of the buyers, seized and sold by the customs authorities, when, if the buyers had informed the sellers, the apparent fraud upon the customs laws could have been explained; and the goods were thus

lost, the buyers were held as by a sufficient delivery and acceptance; *Tower v. Tudhope*, 37 U. C. Q. B. 207.

(h) *Low v. Andrews*, 1 Story, 38. Where a buyer has received and sawed certain timber orally sold him he is liable for the consideration, which was to pay a certain sum to a creditor of the seller; *Dollard v. Potts*, 6 All. N. B. 447.

(i) *Fawcett v. Glossop*, 69 L. T. 287 (*Wakefield C. C.*).

In a case in *7 Carrington & Payne* the following charge was given the jury: "We find that the defendant takes a person to look at it, and say who is likely to want it. You will say whether that is not a dealing with it as his own; and when another witness asks him what he is going to do with it, the defendant does not say that it

ance where a grave-stone is made and put over a grave in accordance with the defendant's directions, and is repeatedly approved by him after it is put up.(j) For further examples of sufficient delivery and acceptance, see the cases in the note below.(k)

§ 275. The following are some general examples of delivery and acceptance held to be insufficient, as where the parties to the contract did no more than make preparations for moving the goods sold.(l) Mere preparation by the seller, as in smoking hams, is insufficient, though in the case in question more smoking was had, and a special kind of wood used at the suggestion of the buyer.(m) It is a question for the jury whether the buyer's act in spreading out to dry certain seed bought was an act of acceptance, or merely one of kindness to the vendor to save his seed.(n) Taking samples of wines and writing prices on labels is not a sufficient acceptance.(o) Where the driver, who was delivering a chattel to the defendants, broke it while entering their yard, there was no delivery and acceptance to

What acts insufficient to make a good delivery and acceptance.

is not his; but he replies, 'I know what I am going to do with it.' And, in his observations to Mr. Meal, he speaks as if it were his own. You will consider whether this convinces you that the defendant treated this fire engine as his own, and dealt with it as such; for, if so, the plaintiff is entitled to a verdict; *Baines v. Jevons*, 7 C. & P. 289.

(j) *Barkalow v. Pfeiffer*, 38 Ind. 221.

(k) *U. S. Reflector Co. v. Rushton*, 7 Daly, 412; *O'Brien v. Credit Valley R. W.*, 25 U. C. C. P. 288; *Mushat v. Brevard*, 4 Dev. 76; *Gray v. Payne*, 16 Barb. 277.

(l) *Dole v. Stimpson*, 21 Pick. 384.

(m) *Kellogg v. Witherhead*, 6 N. Y. S. C. 526. But as to the latter-point quære, see § 256-7, § 247.

(n) *Parker v. Wallis*, 5 E. & Bl. 26.

(o) *Simonds v. Fisher*, cited in *Gardner v. Grout*, 2 C. B., N. S. 342.

Where A. wrote B. offering to sell twelve firkins of butter at a certain price. B. replied saying that he would take ten at a lower price. A. sent twelve firkins by a carrier who refused, according to the custom of his business, to break a parcel and deliver ten firkins. B. tested the butter and found it inferior. The carrier carried the butter back to A. B. subsequently wrote A., returning the invoices sent, and saying that the butter was inferior. A. wrote, and B. wrote again, saying that the butter was not according to A.'s original offer, and on this ground, and because there were two firkins too many, he refused to take the butter. A. wrote again offering to take back the two firkins, but insisting that B. should take the ten. Held, that there was no acceptance to satisfy the Statute of Frauds, the memoranda apparently not being claimed to be sufficient; *Gorman v. Boddý*, 2 C. & K. 145.

satisfy the Statute of Frauds; the article was to be paid for on delivery.(p) Where a tender of merchandise was refused, the vendee saying that he had not time to attend to the matter, but would send for the goods as soon as he needed them, there is not a sufficient delivery and acceptance to satisfy the Statute of Frauds.(q) Merely offering the goods for sale will not bind a buyer who states that he has not accepted them, and that the new sale must depend upon the assent of the original seller. Lord Justice Thesiger remarked that(r) while the buyer's conduct might have been wrongful, it did not show an acceptance. Where the vendee examined the goods and told the warehouseman, the seller's agent, to do nothing for the present, and he, the vendee, was in an insolvent condition, and the court thought that he did not mean to accept unless he could arrange with his other creditors, there was held to be no acceptance.(s) For other examples of insufficient delivery and acceptance, see the cases in the note.(t)

§ 276. There is no acceptance and delivery while anything remains to be done by either party to ascertain the goods.(u) The buyer's right to examine is inviolable. Thus, where by the terms of a verbal contract of sale of goods the vendees were to examine the goods at their own store before giving a note for the price, receipt at the store is no acceptance; that the goods were what they should have been in all respects is immaterial.(v) The quantity of the goods must be first ascertained;(w) though this may not always be necessary, as where a certain drove of cattle is sold irre-

No delivery and acceptance while anything remains to be done to ascertain the goods; weight, measurement, and separation.

(p) *Grey v. Cary*, 11 Reporter, 104 (C. P. N. Y.).

(q) *Scotten v. Sutter*, 37 Mich. 530, distinguishing *Elmore v. Stone*, *Marvin v. Wallis*, *Turley v. Bates*, *Lingham v. Eggleston*, *Young v. Matthews*, *Rohde v. Thwaites*.

(r) *Rickard v. Moore*, 38 L. T. Rep., N. S. 841, distinguishing *Kibble v. Gough*.

(s) *Nicholson v. Bower*, 1 E. & E. 172; 28 L. J. Q. B. 97.

(t) *Flintoft v. Elmore*, 18 U. C. C. P. 281; *Wegg v. Drake*, 16 U. C. Q. B. 253.

(u) *Prescott v. Locke*, 51 N. H. 96.

(v) *Stone v. Browning*, 68 N. Y. 600; 51 N. Y., 211; see *Sadler v. Whitmore*, 5 Jur. 315.

(w) *Saunders v. Topp*, 4 Exch. 393; *Matthiessen v. McMahon*, 38 N. J. L. Rep. 538; *Gilman v. Hill*, 36 N. H. 317-8; *Messer v. Woodman*, 22 N. H. 181.

spective of its number, and see *infra.*(x) Measurement is generally necessary, especially when it is a term of the contract that there should be;(y) while the measuring is taking place, the buyer may refuse to take.(z) Where weight and total price were not finally established the buyer is not bound, though the article sold was barrelled in his presence, the barrels headed up, and marked with his name, and the price per pound agreed on.(a) Where, in a sale of calfskins, the buyer directed the seller to count the skins sold, and set them apart, which was done; then, according to usage, every twentieth skin was opened and dried, and weighed before and after drying; these skins are called "weighing trials," and upon their weight depends the estimate of the weight of the whole mass; the drying and weighing process being completed, the goods were placed in the seller's doorway, ready to be removed; the defendant then called upon the seller, and said that he would take the goods away; the goods were then destroyed by a fire; it was held that until after the weighing, etc., there could be no acceptance, and that whatever was in the nature of a sufficient acceptance took place before and not after this.(b) Where a quantity of cotton was bought at an estimated weight, to be corrected by actual weighing, it was held that there was no delivery and acceptance, though it was agreed that the goods should remain with the seller at the buyer's risk.(c) The goods sold must be separated from the general mass of which they happened to be a part.(d) Separation and identification to constitute delivery must be unequivocal.(e) Where timber is sold as boards per foot board measure, there is no acceptance till measurement.(f) So, where a buyer agreed to take certain goods to be selected by him from a larger bulk, and authorized a wharfinger to receive the entire bulk, but upon examination refused to accept any, the delivery and

(x) *Cunningham v. Ashbrook*, 20 Mo. 558.

(y) *Smith v. New York R. R.*, 4 Keyes, 198; *Pike v. Vaughn*, 39 Wis. 503.

(z) *Gibbs v. Benjamin*, 45 Vt. 130.

(a) *Walrath v. Ingles*, 64 Barb. 275.

(b) *Knight v. Mann*, 120 Mass. 219; 118 id. 143.

(c) *Bowers v. Anderson*, 49 Ga. 145.

(d) *Gilman v. Hill*, 36 N. H. 317-8; *Messer v. Woodman*, 22 N. H. 181;

Prescott v. Locke, 51 N. H. 96.

(e) *Prescott v. Locke*, 51 N. H. 96.

(f) *Gorham v. Fisher*, 30 Vt. 428.

acceptance was insufficient.(g) Weighing and measuring may be waived ;(h) and the buyer by his negligence may preclude himself from the right to require weighing and measuring.(i) Measuring, it has been said, is incidental not essential.(j) So, weighing ;(k) and it has been also said that weighing and measuring are not absolutely necessary even when the goods are sold by weight and measure ; for when the property sold is in a condition for delivery, and payment of money is not a condition precedent to the transfer, it may be the understanding of the parties that the title should pass at once.(l)

§ 277. The price of the goods must be fixed.(m) In a decision in 20th Missouri a rule somewhat more lax was
 Price must be paid. laid down, and the court said : “ Nor is there any objection to the validity of this transaction as a present sale, growing out of the supposed uncertainty as to the price, although there is no sale until the price is settled between the parties, yet it is settled within the meaning of this rule when the terms of it are so fixed that the sum to be paid can be ascertained without further reference to the parties themselves ; and, indeed, by the common law, the price is fixed within this rule, even when it appears that the parties have agreed that it shall be the reasonable worth of the thing sold, leaving it to the tribunals to ascertain the amount, if they cannot agree upon it themselves.(n)

§ 278. Only less important than the ascertainment of the identity and quantity of the goods sold is the examination of their quality. Subject to a qualification, to be considered in a moment, the general rule is that
 The examination of the quality of the goods. there is no delivery and acceptance as long as the buyer has a right to object to the quantity or qual-

(g) *Hunt v. Hecht*, 8 Exch. 817 ; 22 L. J. Exch., 293.

(h) *Bass v. Walsh*, 39 Mo. 198 ; *Maxwell v. Brown*, 39 Me. 101 ; *Gilliat v. Roberts*, 19 L. J., N. S., Exch. 410, holding a part acceptance, though the goods were not weighed and dressed as required by the contract.

(i) *Castle v. Swarder*, 5 H. & N. 285 ; 29 L. J. Exch. 237, opinion of Bramwell, B.

(j) *Kelsea v. Haines*, 41 N. H. 251 ; see *White v. Hanchett*, 21 Wis. 415.

(k) *Kaufman v. Stone*, 25 Ark. 346.

(l) *Denny v. Williams*, 5 Allen, 3.

(m) *Gilman v. Hill*, 36 N. H. 317 ; *Messer v. Woodman*, 22 N. H. 181 ; *Walrath v. Ingles*, 64 Barb. 275.

(n) *Cunningham v. Ashbrook*, 20 Mo. 558.

ity.(o) The defendant must have a chance of examining the goods he buys.(p) Where the buyers of one hundred tons of alkali shipped ninety-two casks, refused thirty-five casks because damaged, and offered to take the fifty-seven left if they could take them to their establishment and examine the casks; this the sellers refused; there was no writing or other delivery and acceptance; the Statute of Frauds applies.(q) The buyer can depute his right of examination.(r) Weighing by the buyer's servant may be a sufficient compliance with the Statute of Frauds.(s) The right of examination may be waived; in a case in 35 Arkansas the court, speaking of the buyer, said: "That he accepted, and that unconditionally, is shown by the evidence. Whatever may have been the general custom as to reserving the privilege of sampling; and whatever the law may presume in case of such purchase by samples, as to the reserved right of testing the bulk, it is, nevertheless, very clear that parties may agree to an immediate transfer of property with or without samples. They may be used only to influence the judgment of the purchaser; who may act upon his confidence in the seller, and make a positive purchase on the spot."(t)

(o) *Norman v. Phillips*, 14 M. & W. 277; *Hanson v. Armitage*, 5 B. & Ald. 559; *Smith v. Surman*, 4 M. & R. 465; 9 B. & C., 561; *Lloyd v. Wright*, 25 Ga. 215; *Shepherd v. Pressey*, 32 N. H. 55.

(p) *Saunders v. Topp*, 4 Exch. 393; *Acebal v. Levy*, 10 Bingh. 380; *Johnson v. Cuttle*, 105 Mass. 449.

Where the plaintiff was the vendor of certain timber, which was to be sawed in a particular manner by the plaintiff; and the timber when sawed was dumped on a common near the defendant's house, and the defendant's servant helped to unload; the defendant objected to part of the timber as not properly sawed, and the plaintiff wrote rescinding the contract; as there was, under the circumstances, to be an examination and measurement by the

plaintiff, and a further approval by both parties, it was held that there was no sufficient delivery and acceptance to enable the defendant, who was sued in trover, to keep the timber, which he considered satisfactory; *Montgomery v. Ricker*, 43 Vt. 167.

(q) *Hill v. Heller*, 27 Hun, 417.

(r) *Bushell v. Wheeler*, 15 A. & Ell., N. S., cited in *Morton v. Tibbett*, note, p. 445; see *Mead v. Southeastern R. W.*, 18 W. R. 735.

(s) *Simon v. Metiver*, Wm. Bl. 599.

(t) *King v. Jarman*, 35 Ark. 196.

Where there was evidence for the jury that the defendant by parol agreed to manufacture at the mill of one M. certain lath, and deposit it on M.'s dock; that the title was not to pass till the defendants had had the lath inspected, but that the defendant

§ 279. The following are some examples of refusal on the score of defect of quality: Thus, where there was an order for a bale of sponges at 11*d.* per lb., and the buyers, after examination, declined to take them, because they were only worth 6*d.* per lb.; as there was no evidence as to what quality had been agreed upon, it was held that this showed no compliance with the Statute of Frauds.^(u) A delay of several days in making an examination has not been considered too much. In the special case the article sold was wool.^(v) For other examples of a refusal, showing that there was no acceptance, see the note below.^(w) The extent of the right of refusal is shown by a case in the Common Pleas of Upper Canada: It was held that where a machine was bought, and received, and tried, and found not to be up to warranty, and then returned, the Statute of Frauds is no defence to a suit on the warranty for the expense which the plaintiff had been at in trying and in transporting the machine; the oral contract was executed, and therefore the Statute of Frauds did not apply.^(x) The following are examples of an acceptance after examination made: Thus, where hops were sold by sample, and sent by the vendor to his factor's warehouseman, at whose place the warehouseman, on behalf of the vendor, and an agent of the vendee, weighed the hops, compared them with the samples (all this strictly according to the usage of the trade); the parties also adjusted certain allowances as to weight and

waived the inspection and accepted the lath unqualifiedly; the jury having found acceptance; instructions leaving it to them to say whether there had been unqualified acceptance were affirmed in error; *Mason v. Whitbeck*, 35 Wis. 167.

(u) *Kent v. Huskinson*, 3 B. & P. 233. But where the defendants acknowledged receiving the goods in suit, but alleged that they were of bad quality, and that defendants had paid the plaintiffs all that the goods were worth; and that the plaintiffs having refused them when rejected by the defendants, they,

the latter, sold them for what they would bring; it was held that no point could be made as to the Statute of Frauds, as the latter was not pleaded, and as the pleadings showed a delivery of the goods; *Graff v. Foster*, 67 Mo. 521, citing cases.

(v) *Rickard v. Moore*, 38 L. T. Rep., N. S. 841.

(w) *Fitzsimmons v. Woodruff*, 1 N. Y. Supreme Ct. 3; *Heermance v. Taylor*, 14 Hun, 149; *Grover v. Cameron*, 6 U. C. Q. B., O. S. 197.

(x) *Northwood v. Rennie*, 28 U. C. C. P. 209.

quality, and the usage of the trade was that after this no objection could be heard; it was held that there was enough evidence of delivery and acceptance to go to a jury.^(y) Where the buyer chose silver dishes by the examination of one as a sample, and directed his name and his crest to be put on them all, and that they should be delivered to a carrier, it was held that the Statute of Frauds was satisfied, the buyer having fully enjoyed his right of examination.^(z) Where goods having been delivered to the defendant, he sent a specimen to be analyzed, and during the analysis sold a small quantity of the goods; the report of the analysis being unfavorable, he refused to accept more; the question of acceptance was left to the jury, who found for him; this was held to be correct, but judgment for the goods sold was entered for the plaintiff, the jury having found their value. There was also a question for the jury whether the goods were sold on sample, or on sale or return.^(a) For other examples of sufficient acceptance after examination see the note below.^(b)

§ 280. As was said in § 278, there is to the doctrine, that before he is bound the buyer has a right to examine the goods, an important qualification now well established, namely, that the buyer may have so far accepted the goods as to do away with the objection of the Statute of Frauds, and yet may retain the right to examine the goods and to reject them if not of proper quality; so that it does not follow because the buyer can later examine and reject the goods if of inferior quality; that he has not so far accepted them as to preclude himself from raising the objection that the contract was oral. The law was supposed formerly to be otherwise.^(c) But the rule is now well settled.^(d) Lord Campbell, in *Morton v. Tibbett*, said that "It would be very difficult to

Right to reject for defect of quality, how far consistent with a sufficient acceptance under the Statute of Frauds.

(y) *Simmonds v. Humble*, 13 C. B., 277; see, *semble*, *Bacon v. Eccles*, 43 N. S., 261. Wis. 233; and see *Hewes v. Jordan*, 39

(z) *Walker v. Boulton*, 3 U. C. K. B., Md. 478; see, also, *Barkalow v. Pfeiffer*, 38 Ind. 221, in which it was said if the

(a) *Clark v. Wright*, 11 Ir. C. L. 405. goods were below quality the buyer

(b) *Hill v. McDonald*, 17 Wis. 100. would be entitled to a deduction.

(c) *Howe v. Palmer*, 2 B. & Ald. 323; (d) *Morton v. Tibbett*, 15 A. & Ell., see *Norman v. Phillips*, 14 M. & W. N. S., 431.

reconcile the cases on this subject, and the difference between them may be accounted for by the exact words of the seventeenth section of the Statute of Frauds not having been always had in recollection. Judges as well as counsel have supposed that to dispense with a written memorandum of the bargain there must first have been a receipt of the goods by the buyer, and, after that, an actual acceptance of the same. Hence, perhaps, has arisen the notion that there must have been such an acceptance as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract has been fully performed by the vendor. As part payment, however minute the sum may be, is sufficient, so part delivery, however minute the portion may be, is sufficient. This shows conclusively that the condition imposed was not the complete fulfilment of the contract to the satisfaction of the buyer. In truth, the effect of fulfilling the condition is merely to waive written evidence of the contract, and to allow the contract to be established by parol as before the Statute of Frauds passed. The question may then arise whether it has been performed either on the one side or the other.”(e)

§ 281. Another important element in the question of delivery and acceptance is that of the continuance of the vendor's lien for the price, and there is much authority for the general rule that if the vendor's lien subsist there is no delivery and acceptance suf-

The continuance of the vendor's lien for the

(e) 15 A. & Ell., N. S., 431, distinguishing *Tempest v. Fitzgerald*, *Carter v. Toussaint*, *Smith v. Surman*, and *Howe v. Palmer*, as cases where the goods remained in the seller's possession; and *Hanson v. Armitage and Norman v. Phillips* on the ground that the delivery to a carrier in these was the final act of the transaction; *Abbott's dictum* in *Howe v. Palmer* and *Alderson's dictum* in *Norman v. Phillips* denied; *Hart v. Sattley*, *Chaplin v. Rogers*, *Blenkinsop v. Clayton*, and *Bushell v. Wheeler* relied on; for a corrected statement of the last case see the principal case. *Morton v. Tibbett* is supported

by *Kibble v. Gough*, 38 L. T. Rep., N. S., 204; *Castle v. Sworder*, 4 id. 868; 5 H. & N., 285; *Currie v. Anderson*, 2 E. & E. 599; 29 L. J. Q. B., 90; *Parker v. Wallis*, 5 E. & B. 26; *Barnett v. Farley*, 11 L. T., N. S., 107; 12 W. R. 748; *Grimoldsby v. Wells*, L. R., 10 C. P. 393; 44 L. J. C. P., 203; *Smith v. Hudson*, 6 B. & S. 445; 34 L. J. Q. B., 145; *M'Master v. Gordon*, 20 U. C. C. P. 19; *Tower v. Tudhope*, 37 U. C. Q. B. 207; *Robinson v. Gordon*, 23 id. 147; *Garfield v. Paris*, 96 U. S. 563; *Safford (Ex parte)*, *Downing (Re)*, 2 Low. 564; *Remick v. Sandford*, 120 Mass. 315; 118 id. 107.

ficient to satisfy the Statute of Frauds.(f) In a case in 2d Lowell, already cited, the court said: "It has often been decided that there can be no sufficient receipt by the vendee so long as the vendor holds as vendor, and insists on his lien for the price. The reason is given by Abbot, C. J., in an early case, that if the vendee had actually received the goods, it would necessarily follow that he could maintain trover for them, and the vendor would be left to his action for the price. In this case there is no doubt that the vendor's lien is gone; for the vendee usually removed the goods within the sixty days for which credit was given, and had an undoubted right so to do."(g) In a late Massachusetts decision it was said that in the case at bar there was no actual acceptance and receipt of the goods by the defendant. They were never in his possession or control, but remained in the possession and control of the plaintiffs, who refused to allow him to take them, claiming a lien for the price. If they had asserted a lien as vendors, this is inconsistent with the delivery of possession and control, necessary to constitute an acceptance and receipt by the vendee.(h) In a case in the Exchequer Chamber Cockburn, C. J., said that the vendor's lien was incompatible with a title in the defendant, but that where the sale was on credit there was no lien.(i) Where a small part of the goods is taken, but until payment the buyer was not entitled to the rest, and the seller continues to hold, there is no acceptance to satisfy the Statute of Frauds.(j) Under a verbal contract to pay for it in monthly instalments, and subject to the stipulation that it should remain the property of the plaintiff till the price was paid, the plaintiff de-

(f) *Smith v. Hudson*, 6 B. & S. 445; *Cross v. O'Donnell*, 44 N. Y. 665; *Bissell v. Bissell*, 4 N. Y. W. D. 338.

(g) *Safford (Ex p.)*, *Downing (Re)*, 2 Low. 565, citing *Balday v. Parker*, 2 B. & C. 37.

(h) *Safford v. McDonough*, 120 Mass. 291.

(i) *Castle v. Swarder*, 4 L. T., N. S. 868; 5 H. & N., 285.

(j) *Thompson v. Macirone*, 4 D. & R. 620.

livered a sewing machine to the defendant ; the latter having let several periods of payment go by and having paid nothing, it was held that there was sufficient acceptance to satisfy the Statute of Frauds, and that the defendant was liable for the instalments at time of action brought.(k)

In a Minnesota case a refusal of the following instruction was affirmed, viz: that " Delivery of the wheat, in expectation of payment as soon as the same was cleaned and weighed, vested no title in the defendant until the price should be paid." The court did charge that " Where nothing is said or done indicating a different intention a sale is presumed to be for cash, and when for cash payment is to precede or be contemporaneous with the delivery of the goods to the buyer, and until payment is made the title and control are still with the seller. This lien on the part of the seller for the purchase-money may be abandoned, and is abandoned, by absolute delivery of the property by the seller to the buyer." Also, " If you believe that he (Simpson) abandoned his lien by giving absolute control to Krumdick, so that Krumdick had the right to take it away and dispose of it as he pleased without first paying for it, why then you may find that there was an acceptance of the property, within the meaning of the Statute, by Krumdick by his subsequent exercise of acts of ownership. But if you believe that Simpson did not surrender absolute control and right of disposition of the property, so as to abandon his lien for the purchase-money, but simply gave Krumdick the right of cleaning and weighing preparatory to a delivery of it upon the payment of the purchase-money, then there never was in law a consummated sale of the wheat by Simpson and a purchase by Krumdick." The request was erroneous, for Simpson may have made delivery of the wheat for the purpose of passing the title, although it was to be paid for as soon as cleaned and weighed, and before removal from the warehouse.(l) The right of stoppage *in transitu* is connected with the present point, but this is of little value as a test of the sufficiency of the buyer's acceptance, because the

(k) Pinkham v. Mattox, 53 N. H. 602.

(l) Simpson v. Krumdick, 28 Minn. 353.

right to stop may remain, yet the acceptance to satisfy the Statute of Frauds be complete.^(m) Indeed, the right to stop continues even where there is a memorandum.⁽ⁿ⁾ And, on the other hand, the *transitus* may be at an end, and yet there be no sufficient acceptance.^(o) In a late Massachusetts case, speaking of the acceptance required by the Statute of Frauds, the court said that the acceptance referred to is that which the Statute requires to give validity to the contract. It must be with intention to perform the whole contract, and assert the buyer's ownership under it, but it is sufficient if it be of part of the goods only. Such an acceptance implies the existence of a completed contract, sufficient to pass the title, which is not to be confounded with that actual transfer of possession necessary to defeat the vendor's lien or his right of stoppage *in transitu*, or to show an actual receipt under the Statute.^(p) In a decision in 3 Hurlston and Coltman, the court said: "This is one of those cases in which the use of the term stoppage *in transitu* is calculated to mislead. The question is not one of stoppage *in transitu*, but whether the lien of the defendants as unpaid vendors had ceased so as to prevent them from taking possession of the timber which was not in their custody, or in that of the vendees, but in the custody of a third person, viz., a wharfinger. It appears to me more a matter of fact than of law, the question being whether the vendee had taken actual possession."^(q) It has, indeed, been said that both the seller's lien and the right to stop *in transitu* must be gone.^(r) There are a number of decisions in which the "seller's lien" test is regarded as being of little value. Thus, where chattels were sold by parol by the plaintiff to the defendant, and were removed to a warehouse belonging to a third party, and used by the defendant: the chattels were

(m) Cross v. O'Donnell, 44 N. Y. 665; (*Ex parte*) Safford, (*Re*) Downing, 2 Low. 564.

(n) Bushell v. Wheeler, 15 A. & Ell., N. S., 445.

(o) Smith v. Hudson, 6 B. & S. 445; 34 L. J. Q. B., 145; i. e., there may be delivery without acceptance.

(p) Townsend v. Hargreaves, 115 Mass. 332.

(q) Cooper v. Bill, 3 H. & C. 729.

(r) Fawcett v. Glossop, 69 L. T. 287 (Wakefield, C. C.); see Mart. Ld. Tent. Act, 153.

here wrapped in coverings belonging to the defendant. The course of trade was that the chattels should not be taken from the warehouse till paid for; it was held that whatever might be the plaintiff's interest for the unpaid price, this was not inconsistent with the possession being had by the defendant, and the Statute of Frauds was satisfied by sufficient delivery and acceptance, and an action lay for goods sold and delivered.^(s) The continuance of the vendor's lien is only one test.^(t) So where it was proved to be the custom of the tea-trade for the buyer to make a part payment, and then to leave the goods with the seller as a pledge for the payment of the rest of the price, the Statute of Frauds would be complied with.^(u) In a case in the Upper Canadian Queen's Bench the "lien" test theory was said to be no longer respected.^(v) In the note are some examples of the seller's lien not being gone, and, therefore, no sufficient acceptance established.^(w) Where an agent is instructed not to deliver unless the price of the goods is paid, there is no compliance with the Statute of Frauds until such payment;^(x) and generally where it is understood that the seller will not part with the goods until payment, acts doubtful in character will not be assumed to be a compliance with the Statute.^(y) The following are some examples of the lien gone; where the goods are delivered to the buyer's warehouse;^(z) or even a delivery on public land near the buyer's premises;^(a) or where by the contract the delivery was to be immediate.^(b)

(s) *Dodsley v. Varley*, 12 A. & Ell. 858; *Flintoft v. Elmore*, 18 U. C. C. P. 281; see *Pinkham v. Mattox*, 53 N. H. 602, citing *Morton v. Tibbett and McKnight v. Dunlop*.

(t) *Wright v. Percival*, 8 L. J., N. S., Q. B. 258, citing *Elmore v. Stone* as a case where the vendor's lien subsisted.

(u) *Moffatt (Ex parte)*, *Tate (Re)*, 2 M. D. & De G. 176; 1 id., 283.

(v) *Wegg v. Drake*, 16 U. C. Q. B. 253.

(w) *Harvey v. St. Louis Butch. Ass.*, 39 Mo. 217; *Maberly v. Sheppard*, 10 Bing. 100; *Baldev v. Parker*, 2 B. & C. 40; *Carter v. Toussaint*, 3 B. & Ald.

(x) *Bill v. Bament*, 9 M. & W. 40.

(y) *Phillips v. Bistolli*, 2 B. & C. 513; *Tempest v. Fitzgerald*, 3 B. & Ald. 682, distinguishing *Blenkinsop v. Clayton* as a sale not for ready money.

(z) *Cusack v. Robinson*, 1 B. & S. 306; 4 L. T., N. S., 505; 30 L. J. Q. B., 261.

(a) *McNeil v. Keleher*, 15 U. C. C. P. 473.

(b) *Bissell v. Bissell*, 4 N. Y. W. D. 338, N. Y. S. C.

§ 282. Delivery to and acceptance by an agent is an adequate compliance with the Statute of Frauds.^(c) The buyer may accept goods by "taking them into the control of himself or of his authorized agent, or by making the seller or a third person his bailee to hold them for him, so as to terminate the seller's possession."^(d) And an agent's unauthorized acceptance may be ratified by a subsequent adoption by the principal.^(e) The same factor cannot act as seller and as agent of the vendee to accept.^(f) The seller is not an agent of the buyer to accept the goods sold, and such agency must be proved outside of the contract itself.^(g) To make the seller bailee to hold for the buyer there must be a new agreement.^(h) Where the buyer of goods has procured them for a third person, it has been held in a New York case that the complaint must aver that such third person was agent for the buyer, the defendant, to receive them, and did receive them, so as to bind the defendant.⁽ⁱ⁾ Acceptance by such third person satisfies the 17th section of the Statute of Frauds.^(j) A husband may lose his marital right to chattels left out of his wife's marriage settlement by putting them in the custody of the wife's trustees.^(k) Sheep pastured by the seller's agent and afterwards sold by the principal and kept by the agent for the buyer, being selected and marked by the latter, cannot be levied upon as the property of the seller.^(l) Where the plaintiff by writing sold goods to C. H., an infant, and sent them to the defendant to be prepared for C. H., and afterwards the plaintiff and C.

Delivery to and acceptance by an agent; who may be agent.

(c) *Snow v. Warner*, 10 Metc. 137; *Cross v. O'Donnell*, 44 N. Y. 661; *Outwater v. Dodge*, 6 Wend. 400; *Descord v. Bond*, 2 Stark. Ev. (Gerh. Ed.), p. *488 (note n); *Lord Hardwicke*, 7 Geo. II.; *Dodsley v. Varley*, 12 A. & Ell. 633.

(d) *Rodgers v. Jones*, 129 Mass. 420.

(e) *Hankins v. Baker*, 46 N. Y. 670.

(f) *Clark v. Tucker*, 2 Sandf. 165; *Caulkins v. Hellman*, 47 N. Y. 449; 14 Hun, 330; the vendor's agent to negotiate the sale cannot be the buyer's agent to accept the goods sold; *Howe*

v. Palmer, 3 B. & Ald. 323; the seller's agent, even if he had measured the goods at the buyer's request, is not his agent to accept.

(g) *Smith v. Bouck*, 33 Wis. 25; see *Lewin v. Stewart*, 17 How. Pr. 6.

(h) *Smith v. Bouck*, 33 Wis. 25.

(i) *Smith v. Leland*, 2 Duer, 508; see *Dyer v. Forest*, 2 Abb. Pr. 285.

(j) *Dean v. Tallman*, 105 Mass. 444.

(k) *Simmons v. Simmons*, 12 Jur. 8; 6 Hare, 352.

(l) *Barney v. Brown*, 2 Vt. 377.

H. went to see the defendant and requested him to send the goods back to the plaintiff, and the defendant said he would return them or pay for them, it was held that the 17th section of the Statute of Frauds did not apply to the new contract, and the verbal rescission of the sale from the plaintiff to C. H. was valid.^(m) Sending goods to a warehouseman, designated by the vendee, and who accepts them, complies with the Statute of Frauds.⁽ⁿ⁾

§ 283. The following are some further examples of acceptance by an agent: Thus, where wheat was taken to an elevator belonging to B., a third party, at the request of the defendant and for his account, and B., as agent for the defendant, the buyer compared the wheat with the samples, and according to usage receipted to the seller for the same.^(o) And where the defendant, a buyer, examined certain specific goods at Liverpool, and ordered them sent to Fennings's wharf, London; they were so sent; and Fennings kept a warehouse at his wharf which the defendant habitually used; it was held that there was evidence for the jury of a delivery and acceptance.^(p) It has been held that a delivery of chattels to a wharfinger to be valid must be to the wharfinger himself, his proved agent, or the goods must be booked and a receipt taken.^(q) One who gives a verbal order to his broker to purchase certain stock, in pursuance of which the broker purchases the stock, and the same is on the following day delivered to and paid

(m) *Douglas v. Watson*, 17 C. B. 695.

(n) *Safford (Exp.)*, *Downing (Re)*, 2 Low. 564; see *Dyer v. Forest*, 2 Abb. Pr. 285; *Moore v. Campbell*, 23 L. J. Exc. 310; *Townsend v. Hargreaves*, 118 Mass. 332.

(o) *Dows v. Montgomery*, 5 Roberts. 453.

(p) *Cusack v. Robinson*, 1 B. & S. 306; 4 L. T., N. S., 506; 30 L. J. Q. B., 261; in the opinion of Blackburn, J., *Nicholson v. Bower* was distinguished as a case where no specific selection was made, and before any acceptance

there must have been an examination by sample; and *Meredith v. Meigh*, following *Hanson v. Armitage*, distinguished as a case where the selection was made by the seller, and where the carrier, though named by the buyer, had been given no authority to accept. *Baldry v. Parker* distinguished as going on the ground of the vendor's lien not being given up. Vendor may give up his lien and hold as warehouseman; *Marvin v. Wallis*, *Beaumont v. Brengeri*, and *Saunders v. Topp*, were cited.

(q) *Buckman v. Levi*, 3 Camp. 415.

for by him, cannot insist that the contract is void, on the ground that no part of the stock was delivered and no money paid at the time of giving the order. The delivery by the seller, and the acceptance by the broker, acting as the agent of the buyer, renders the contract valid and binding.(r) Where goods were packed by the buyer's men, and were taken with a delivery order by his packer and carter, a jury may find the fact of a sufficient acceptance.(s) The following are some examples of a transaction not constituting a sufficient acceptance: Thus, where there was a receipt of a bill of lading by the buyer's clerk, and there was no evidence that the clerk had authority to accept, and before the buyer knew the bill had been left, he had notified the seller that he would not accept.(t) In a case in *Ellis, Blackburn & Ellis*, Lord Campbell said: "The legislature continues to maintain section 17 of the Statute of Frauds; and I do not think that the enactment is satisfied by the facts of this case. All that can be said is that the purchaser here named the wharf, and that there was a delivery at that wharf. But in the present case there was a delivery at the wharf only; the wharfinger had only to see that the goods were properly put on the wharf and hoisted on board ship." Judge Coleridge said: "I am of the same opinion. It is impossible to say that the mere naming of the wharf makes the wharfinger the agent to accept. Mr. Lush seems to assume that the wharfinger was placed in the situation of the vendee; but the facts do not bear that out."

(r) *Rogers v. Gould*, 6 Hun, 229.

(s) *Kershaw v. Ogden*, 3 H. & C. 717; see *Kibble v. Gough*, 38 L. T., N. S. 204.

(t) *Quintard v. Bacon*, 99 Mass. 186; see *Sherman v. Williams* (S. C. N. Y.), 4 N. Y. Week. Dig. 415, where the agent was a teamster and the goods barrels of flour; see, also, *Bill v. Bament*, 9 M. & W. 40. And where L., a factor, sold the plaintiff's wheat to defendant, and agreed to carry it from Nottingham to Derby and place it at his (L.'s) warehouse at Derby; the price agreed was higher than the market

price in consideration of L.'s carrying the goods; the defendant asked T., at Nottingham, who had the wheat, to see it delivered, measured, and put up properly; it was held a contract for the sale of goods, and within the Statute of Frauds, notwithstanding the price included the carriage, and that the acts of T. were not an acceptance to bind defendant, inasmuch as the delivery was to be at Derby, not Nottingham, and the inspection by T. did not involve necessarily the idea of an acceptance; *Astey v. Emery*, 4 M. & S. 264.

Judge Erle said: "I agree that the sending to the wharf and the putting on the wharf does not satisfy the words accept and actually receive, however absurd the words of the Statute may be."^(u) Where there was a sale of railroad ties, some placed on the defendant's land and some on land adjoining; and their engineer in clearing a road moved some of the latter on their land, and their servants used some of the ties in making the road (this was contrary to their orders); it was held that there was no sufficient delivery and acceptance.^(v) An acceptance by one of several joint-purchasers is sufficient;^(w) or by one partner.^(x) In a Michigan decision a distinction was made between a joint-purchase and a partnership purchase, and it was said that where two jointly bought by parol goods

(u) *Hart v. Bush*, E. B. & E. 496; 27 L. J. Q. B., 272.

(v) *Wade v. New York R. R.*, 52 N. Y. 627.

So piling up wood at a railroad station where the defendants were in the habit of receiving their wood, and a railroad employé directed where the wood was to be placed. There was no evidence of acceptance, the employé having general orders where to put the wood, but no special authority to accept; *Smith v. New York R. R.*, 4 Keyes, 198.

Where one Eastman was indebted to the plaintiff, who had attached the goods in question, which were on Eastman's land; the goods were sold by auction and bought by the plaintiff, who went to Eastman's to take them, and Eastman asked him not to take them, and that he, Eastman, would get the defendant to become responsible for them, and the plaintiff thereupon left the goods, and upon asking the defendant afterwards if he would take them, he, the latter, said he would. The court said: "At the time of the sale to defendant the property was in the actual possession of Eastman, where plaintiff had permitted it to remain

from the time he purchased it at sheriff's sale. There was testimony tending to show that at the time defendant bought it he owned the stock on the farm where Eastman lived, and that at about that time he became the owner of the farm, and that the property was used on the premises; but it does not appear what the relations were between the defendant and Eastman, nor by whose authority the property was used up. There is nothing to show that Eastman was in any sense the defendant's agent, so that his possession could be said to be the defendant's possession. For the purposes of this case Eastman must be taken to be plaintiff's bailee, and his possession plaintiff's possession. Now, where the goods are in the possession of a third person at the time of sale, there must be an agreement by such third person to hold, as the bailee of the buyer, an attornment, so to speak, to him;" *Bassett v. Camp*, 54 Vt. 234.

(w) *Smith v. Milliken*, 7 Lans. 336; *Wilcox Plate Co. v. Green*, 72 N. Y. 19 (the one who accepted was one of several directors of a fair).

(x) *Lewin v. Stewart*, 17 How. Pr. 6.

within the Statute of Frauds, and one afterwards accepted the goods, the other was held not bound, as one joint-purchaser cannot accept for the other; and if it was a partnership purchase, the firm was dissolved before the acceptance.(y)

§ 284. How far receipt by a carrier is acceptance to bind the buyer is a point involved in no inconsiderable contradiction. The preponderance of authority now is, that unless the carrier is one specially designated by the buyer, the carrier's receipt of the goods is no acceptance.(z) Where the consignor sends goods by a carrier; the consignee having given no direction as to how the goods were to be sent; the consignors sent the invoice to the consignees; the carriers are held to be liable to the consignors for loss of the goods; there was no title in the consignees; and the invoice was a mere memorandum.(a) In a New York decision, not dealing with any question connected with the Statute of Frauds, the court said: "In absence of some order, agreement, or usage delivery to a common carrier is no delivery to the defendant, so as to lay ground for goods sold and delivered.(b) A carrier is an agent to receive, not to accept; the latter func-

Delivery to
common
carrier.

(y) *Chamberlain v. Dow*, 10 Mich. 324.

(z) *Norman v. Phillips*, 14 M. & W. 277; *Bushell v. Wheeler*, 15 A. & Ell., N. S. 445, note; *Acebal v. Levy*, 10 Bing. 380; *Smith v. Hudson*, 6 B. & S. 445; 34 L. J. Q. B. 145, considering *Hart v. Bush* and *Hunt v. Hecht*; *Meredith v. Meigh*, 2 E. & Bl. 370; *Hopton v. McCarthy*, L. R., 10 Irel. 271; *Tower v. Tudhope*, 37 U. C. Q. B. 210, citing cases; *Daley v. Marks*, Berton, N. B. 346; *Bullock v. Tschergi*, 13 Fed. Rep. 344 (C. C. D., Ia.); *Denmead v. Glass*, 30 Ga. 638; *Maxwell v. Brown*, 39 Me. 101; *Jones v. Mechanics' Bank*, 29 Md. 293, overruling *Hart v. Sattley*; *Johnson v. Cuttle*, 105 Mass. 449; *Atherton v. Newhall*, 123 Mass. 142; see *Suit v. Woodhall*, 113 Mass. 394; *Webber v. Howe*, 36 Mich. 154, which, with the following cases, turned

on the question as to the application to the contract of the liquor laws of a particular state; see, also, *Rindskop v. De Ruyter*, 39 Mich. 1; *Keiwert v. Meyer*, 62 Ind. 587; *Hausman v. Nye*, 62 Ind. 487; *Everett v. Parks*, 62 Barb. 15; *Marsh v. Rouse*, 41 N. Y. 646; *Stevens v. Langeman*, 5 N. Y. Leg. Obs. 19; *Rodgers v. Phillips*, 40 N. Y. (1 Hand) 523; *Sherman v. Williams*, 4 N. Y. Week. Dig. 415 (S. C. N. Y.); *Caulkins v. Hellman*, 47 N. Y. 449; 14 Hun, 330; *Audenreid v. Randall*, 3 Cliff. 99.

(a) *Coats v. Chaplin*, 3 Q. B. 489; see *Coombes v. Bristol R. R. Co.*, 3 H. & N. 511; 27 L. J. Ex. 401, citing cases; *O'Neill v. New York R. R.*, 3 Roberts. 403; *Law v. Hatcher*, 4 Blackf. 364; see *semble, contra*, *Dutton v. Solomonson*, 3 B. & P. 584, a case not affected by the Statute of Frauds.

(b) *Everett v. Parks*, 62 Barb. 15.

tion does not belong to him.”(c) He cannot make a contract for the buyer.(d) Even where the usage of the parties is to send the goods in a particular way, a general order by the buyer will not authorize the carrier to accept.(e) Where goods are shipped in a way generally indicated by the buyer, and upon the vessel being wrecked and a portion only of the cargo saved, the buyer takes and sells that portion, the delivery and acceptance is sufficient.(f) In a Michigan case it was said: “Where the delivery to the carrier is merely in pursuance of the same verbal contract under which the goods were purchased, and the carrier has no independent and separate authority to act for the purchaser, his reception of the goods could only be valid because the contract itself was valid; and if the delivery and acceptance was the first transaction which gave force to the contract in the case before us, it is clear that it must have been a delivery to the party, and to no one else. It involves a sophism to hold that a void contract can furnish authority to a third person to ratify it. If it was good to create the agency, the agency was entirely unnecessary.”(g) Under the Iowa Statute of Frauds, which uses the word “deliver,” and not the word “accept,” a delivery to a common carrier, though not designated by the vendee, satisfies the Statute.(h)

§ 285. The rule was at one time believed to be that the carrier, when especially he habitually carried for the parties to the contract, could bind the buyer by his acceptance.(i) Delivery and acceptance by a wharfinger will not bind the vendee, though the goods had been ordered by the latter, and the custom between the parties was to send them by this wharfinger.(j) It has been held that where an order was given in

Carrier
habitually
employed.
Examples
of carrier's
acceptance
being
sufficient.

(c) *Allard v. Greasert*, 61 N. Y. 5.

(h) *Bullock v. Tschergi*, 13 Fed. Rep.

(d) *Tower v. Tudhope*, 37 U. C. Q. B. 210; *Atherton v. Newhall*, 123 Mass. 142.

344 (C. C. D., Iowa).

(e) *Meredith v. Meigh*, 2 E. & Bl. 370.

(i) *Hart v. Sattley*, 3 Camp. 528, overruled in *Meredith v. Meigh*, 2 E. & Bl. 370; see *Hausman v. Nye*, 62 Ind.

(f) *Goddard v. Demerritt*, 48 Me. 211.

489, citing cases.

(g) *Grimes v. Van Vechten*, 20 Mich. 413.

(j) *Hanson v. Armitage*, 5 B. & Ald. 559.

Wales to the traveller of a dealer in London, and no mention was made of a carrier, and a carrier in London was selected by the seller, a cause of action arises in London.^(k) In a Nova Scotian decision it was held that delivery to the "care of" a railroad would be sufficient to hold the buyer defendant under an oral contract, if he had been advised by letter or invoice from the plaintiff; but such a sending is not an acceptance by the railroad as agent for the defendant where no such notice is given by the plaintiff; though the defendant heard of the arrival of the goods from another source of information, and did not notify the plaintiff till five months after the arrival of the goods, when the plaintiff drew on him for the price.^(l)

§ 286. If the carrier is designated by the buyer, there is much authority for saying that the former's receipt is equivalent to acceptance.^(m) Delivery to a carrier by the consignor at the consignee's order vests the title in the goods in the latter at common law.⁽ⁿ⁾

Carrier
designated
by the
buyer.

So where there is delivery of the goods to a carrier, and a delivery order is taken, which the seller transfers to the buyer, who gives the carrier directions as to the delivery, the title in the goods, notwithstanding the Statute of Frauds, is in the buyer, and cannot be attached as the seller's property.^(o) Where there is delivery at the place indicated by the buyer's agent to another agent of the seller, and by him shipped to the place indicated by the buyer, under a general direction as to shipping such goods, it has been held that the Statute of

(k) *Copeland v. Lewis*, 2 Stark. 31.

(l) *Ames v. Ginty*, 16 Can. Law Jour. 36 (County C., Annapolis, N. S.), distinguishing *Bushell v. Wheeler*. Query, whether a delivery of hay on board a barge, owned by defendant, is a sufficient acceptance where the captain was requested (by whom?) to go to a certain place for hay, and went and took the hay, not knowing that it was for the defendant; he receipted for it; the barge was lost; *semble* the delivery and acceptance were sufficient; *Silver v. Bowne*, 55 N. Y. 660.

(m) *Bushell v. Wheeler*, 15 A. & Ell.,

N. S. 442 (note); *Currie v. Anderson*, 2 E. & E. 598; 29 L. J. Q. B. 90; *Moore v. Campbell*, 23 L. J. Ex. 310; *Ex parte Safford, Downing (Re)* 2 Low. 564, citing cases; *Denmead v. Glass*, 30 Ga. 638; *Hausman v. Nye*, 62 Ind. 487; *Grimes v. Van Vechten*, 20 Mich. 413; *Outwater v. Dodge*, 6 Wend. 400; *Thompson v. Menck*, 4 Abb. Dec. 403; 2 Keyes, 82; 22 How. Pr., 431; *Dyer v. Forest*, 2 Abb. Pr. 283; *Allard v. Greasert*, 61 N. Y. 5; *Spencer v. Hale*, 30 Vt. 314.

(n) *Dawes v. Peck*, 8 T. R. 332; *Allard v. Greasert*, 61 N. Y. 5.

(o) *Hatch v. Lincoln*, 12 Cushing, 33

Frauds was complied with, *(p)* and it has been thought that the delivery of chattels by the agreement of both parties to a common carrier would satisfy the Statute of Frauds. *(q)* Where the defendant writes the plaintiff: "I had a letter from Mr. Wagner to-day, informing me that he would bring down the bones which I bought of you at ten shillings, etc., and I wrote him to bring them; you will, therefore, please deliver them to him, as also the fine black, etc.;" the goods were delivered to a carrier indicated by Wagner; this was held to satisfy the Statute of Frauds. *(r)* Where the buyer when ordering the goods has examined them, and they are then delivered to an agent named by him, there can be little doubt but that the Statute of Frauds is satisfied. *(s)* Where the Statute of Frauds has been complied with by a writing, delivery of chattels to a particular or to even any carrier, if done by the order of the vendee, vests title in the latter, subject to his right of examination and rejection for cause. This rule extended to the case of a verbal contract, if the delivery is to a carrier named by vendee. *(t)*

§ 287. It has, however, been questioned whether the mere designation of a carrier makes his receipt of goods acceptance to bind the buyer, especially if the latter has not chosen and examined the particular articles, and the preponderance of authority is to this effect. In a case

*Contra to
the last
rule.*

(p) Snow v. Warner, 10 Metc. 133.

(q) Ullman v. Barnard, 7 Gray, 557.

(r) Thompson v. Menck, 4 Abb. Dec. 403; 2 Keyes, 82; 22 How. Pr., 431. Delivery to a carrier named by the vendee is such receipt and acceptance, though the defendant never actually got the goods; the defendant could at any time have taken the goods out of the possession of the railroad, subject only to a possible right of stoppage *in transitu*; Strong v. Dodds, 47 Vt. 354.

(s) Walker v. Boulton, 3 U. C. K. B., O. S. 254. So where the plaintiff gave one B., a dealer in flour, the authority to select certain amounts from the bulk in his (B.'s) possession, and sent the amount so selected to the Great Eastern

Railway, paying the carriage, and, in accordance with a habit between all these parties, the Great Eastern handed over the flour to the defendants, who were paid by the plaintiff, it was questioned whether under the 17th section of the Statute of Frauds the title vested in the plaintiff (Brett, J., thinking it did, as the direction to B. to select took away from the plaintiff all right to reject), but, in any event, the defendants were liable to the plaintiff for injury to the flour during its carriage over their line; Mead v. South. East Ry., 18 W. R. 735.

(t) Glen v. Whitaker, 51 Barb. 451, citing People v. Haynes, 14 Wend. 546, and denying Outwater v. Dodge.

in the 44th New York the court said: "It is not necessary to determine in this case that a mere carrier, designated by the buyer, can both accept and receive for him, so as to make a compliance with the Statute; but I can find no reason, founded upon principle or authority, to doubt that after the buyer has accepted the article purchased, a carrier designated by him to take and transport it can bind him as his agent by receiving it. While there is not upon this question entire harmony in the views of judges, and while the authorities cannot all be reconciled, the general drift of them is toward the conclusion I have reached."^(u) In another New York case it was said, that "it has been held, that when the goods have been accepted by the buyer so as to answer that portion of the Statute which requires acceptance, a delivery to a carrier selected by the buyer will answer that portion of the Statute which requires the buyer to receive. So far as I can discover, it has never yet been decided in any case that is entitled to respect as authority that a mere carrier, designated by the buyer, can both accept and receive the goods so as to answer the Statute."^(v) The authorities are very clear that the acceptance and receipt, which the Statute requires, may be made by an *agent* of the buyer *empowered for that purpose*, but the decided weight of authority, both English and American, is, that the agency to accept and receive cannot be inferred from the mere fact that the buyer has designated a particular vessel or person as *carrier* of the goods."^(w) In *Acebal v. Levy* it was held that delivery abroad on a ship chartered by the defendant was not delivery and acceptance, as the defendant must have a chance of examining the goods, and seeing whether they are merchantable; but that the point of acceptance cannot be made by a plaintiff who has a count for non-acceptance;^(x) and the point was met fully in a case in 105 Massachusetts, in which the court said: "Mere delivery is not sufficient; there must be unequivocal proof of an acceptance and receipt

(u) *Cross v. O'Donnell*, 44 N. Y. 665, Hand), 523, for a division of opinion citing several cases. on this point.

(v) *Allard v. Greasert*, 51 N. Y. 5; (w) *Jones v. Mech. Bank*, 29 Md. see *Rodgers v. Phillips*, 40 N. Y. (1 293.

(x) *Acebal v. Levy*, 10 Bing. 380.

by him. Such acceptance and receipt may indeed be through an authorized agent, but a common carrier (whether selected by the seller or by the buyer), to whom the goods are intrusted without express instructions to do anything but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer, and to take the case out of the Statute of Frauds. The steamboat company having no authority to receive and accept the goods so as to bind the buyer, and there being no evidence that the buyer, in person, or by any authorized agent, ever had actual possession of the goods, or opportunity to see them, or ascertain whether they conformed to his order, or ever exercised any control over them by sale or otherwise, or even received any bill of lading of the goods, the case is within the Statute of Frauds, and the action cannot be maintained.^(y) Delivery to a carrier selected by the seller is of no efficacy when the order as to delivery, which was given by the buyer, was void by the liquor laws of the buyer's state where his, the buyer's, order was given.^(z)

§ 288. Acceptance and delivery must be under the contract and referable to it.^(a) It has been said that delivery and acceptance, which complies with the contract (though *semble* otherwise insufficient), satisfies the Statute of Frauds.^(b) Where the contract was understood differently by the parties, delivery will not validate

Delivery must be under the contract.

^(y) Johnson *v.* Cuttle, 105 Mass. 449.

^(z) Webber *v.* Howe, 36 Mich. 154.

Where a proposed purchaser of a chattel wrote the owner, introducing the purchaser's agent to the latter, saying, "He will use his judgment as to one (*i. e.*, chattel) for Barfold" (the defendant's farm), it was held that the agent to bind the defendant should either have signed a writing or ordered delivery to Barfold. A delivery to a railway to deliver at another place is no acceptance to bind the defendant.

One judge dissenting, thought the difference immaterial, and that acceptance by the railroad as common carrier was sufficient; Mitchell *c.* Watson, 6 Vict. L. R. Law, 499.

^(a) Townsend *v.* Hargreaves, 118 Mass. 332; Sloan Saw-mill Co. *c.* Gutts-hall, 3 Col. 14; Matthieson *v.* McMahon, 38 N. J. Law, 538; Field *v.* Runk, 2 Zab. 525; Garfield *c.* Paris, 96 U. S. S. C. 563; Proctor *v.* Ambler, 1 Can. Law Times, 608 (Ct. App., Ont.).

^(b) Anderson *v.* Hodgson, 5 Price, 630.

it and lay ground for an action for goods sold and delivered.(c) A delivery and acceptance has no effect when the terms of the contract itself are not made out.(d) Where the plaintiff delivered and the defendant received certain goods; in a suit for the price the defendant said that the goods were to be held by him as security for certain acceptances discounted for him; and said that there was no sufficient acceptance to satisfy the Statute of Frauds; it was held that a delivery and acceptance being admitted by both parties, the terms of the transaction could be shown by parol, and a verdict for the plaintiff would not be disturbed.(e) The rule which establishes that equitable part performance, in the case of a sale of land, is without effect where the contract is not clearly proved, or is a mere negotiation, applies to a contract as to personalty; see the chapter on Part Performance.(f) Where the buyer, in his letter, required a warranty that a horse was quiet, and the seller, in his

(c) *Gregson v. Ruck*, 4 A. & Ell., N. S. 747.

(d) *Fagan v. Faulkner*, 5 Ark. 164.

(e) *Tomkinson v. Straight*, 17 C. B. 703; 25 L. J. (N. S.) C. P. 88.

Williams and Crowder, JJ., thought that the acceptance need not show anything more than the relation of vendor and vendee, all the rest could be shown by parol. In argument Phillips *v.* Bistolli was distinguished by Creswell, J., as a case where the goods were returned. Creswell, J., in argument, and Jervis, C. J., in the opinion, said the words in the 17th section, "so sold," mean sold for £10 and upwards; S. C., 25 L. J. C. P., N. S. 87 (fuller report of argument).

Creswell, in argument, said: "If the debtor could claim the price to be less than £10, and if the jury found the price was more than £10, and if he could then say that he did not accept them at the higher price, and so defeat the action, a great fraud could be perpetrated on creditors."

Williams, J., in argument, said that the acceptance is not a badge of

the truth of the terms of the contract, but of the fact only that there is a contract.

Jervis, J., in argument and opinion, said that this was like a sale claimed by the plaintiff to be for cash, and by the defendant to be on credit; if there was an acceptance parol evidence could settle this point.

(f) In *Congdon v. Darcy*, 46 Vt. 484, said the court: "The referee has found that the bills of timber and plank of the house, though they were made out by the plaintiff, were delivered to the defendant by Kent while the negotiations were pending for the contract with the plaintiff and Kent for building the house. They, therefore, cannot constitute a part performance of the contract between the plaintiff and the defendant, if it should be conceded that such a contract had been completed. Although they were made and delivered at the request of the defendant, they were made and delivered as a part performance of an anticipated contract to which Kent afterward refused to become a party."

letter, promised to warrant that the horse was quiet in double harness, it was held there was no concluded contract shown by the writing; and a delivery of the horse to buyer's son was not a delivery and acceptance to bind the buyer, unless the son's authority was to accept on the terms made by the seller, of which there was no evidence.^(g) The necessity of clearly establishing the contract is shown in the following case: In a correspondence between the plaintiff and defendants it did not clearly appear whether the parties agreed upon ten hogsheads or fifteen of wine. The plaintiff shipped fifteen; the defendants wrote they would keep ten if proved to be satisfactory, and refused the five; further correspondence showed, on both sides, an intention that the defendants should have till spring to try the wine; the defendants put the wine in a bonded warehouse, in their own name, till spring; tasted the wine, and refused it all; it was held that the Statute of Frauds applied; that the case should not have been left to the jury to ascertain whether the defendants' delay in trying the wine had been unreasonable. There was no acceptance, because the delivery was not under the contract, being for fifteen instead of ten.^(h) Delivery of unsound goods when the contract called for sound ones is without effect.⁽ⁱ⁾ Where the goods were shipped, but, as the bill of lading varied from the original contract, they were sent back by the buyer, there was no sufficient delivery and acceptance, though the custom was that the goods on board were at the buyer's risk, who, however, refused the goods tendered.^(j) A delivery and accept-

(g) *Jordan v. Norton*, 4 M. & W. 160.

(h) *Cunliffe v. Harrison*, 6 Exch. 905.

So where the defendant saw and agreed to buy a wagon of the plaintiff, and directed it delivered at a certain stable; but the defendant required that a pole should be substituted for shafts, and this the plaintiff agreed to do if the defendant would send a pole that could be fitted at a moderate expense; the defendant sent the pole, which could not be fitted, and without report-

ing it to the defendant the plaintiff sent the carriage as it was to the stable first named; it was held without more to be no delivery and acceptance; *Brewster v. Taylor*, 63 N. Y. 587; 39 N. Y. Sup. 164.

(i) *Lawton v. Keil*, 61 Barb. 558.

(j) *Frostburg Mining Co. v. New England Glass Co.*, 9 Cushing, 117.

In a case in 10 Adolphus & Ellis, new series, Denman, C. J., had left it to the jury to say whether the goods were of the quality represented, and whether the buyer had so dealt with

ance of goods similar to but less in quantity than a certain lot orally sold must, to take the latter contract out of the Statute of Frauds, be shown to be a part of them, and delivered in fulfilment of an agreement covering both; a judgment in a suit relating to the former charging them at a different price from that of the oral agreement, is conclusive against such a contention.*(k)* Where the defendant bought glass from the plaintiff, and three sheets were taken out for his inspection, and the goods by an oversight were packed without the sheets, and the defendant upon their delivery refused to pay unless an allowance was made for the three sheets; the goods were left with the defendant, and the next day the plaintiff's agent called on the defendant, and agreed to make the allowance. Three days later the defendant rescinded and sent back the goods, which the plaintiff declined to receive; the delivery and acceptance was held to be sufficient.*(l)* It has been said in New York that there were a double set of cases, the one regarding transactions subsequent to an invalid parol contract, as to be presumed if in accordance with its terms to have been done thereunder; the other holding the presumption to be the other way.*(m)* In a case arising under the act of Congress of June 2, 1862, requiring contracts with Federal officers to be in writing, it appeared that the claimant had orally sold horses to General Stoneman, and there had been this oral contract in the fall, and the claimant had been directed by General Stone-

them as to make them his own by doing more than was necessary to examine their quality; the jury answered the first question in the negative; the second in the affirmative; a rule for nonsuit was made absolute, the Lord Chief Justice agreeing to this decision; *Curtis v. Pugh*, 10 A. & Ell., N. S. 113.

(k) *Davis v. Eastman*, 1 Allen, 422; see, also, *Deming v. Kemp*, 4 Sandf. S. C. 152; *Saunders v. Topp*, 4 Exch. 392; *Elliott v. Thomas*, 3 M. & W. 176.

(l) *Angel v. Ritch*, 4 W. N. (Eng.) 241.

(m) *Boutwell v. O'Keefe*, 32 Barb. 437, saying that the latter cases are in the Superior Court of New York City, and are as follows: *Seymour v. Davis*, 2 Sandf. Sup. C. Rep. 239; *Deming v. Kemp*, 4 id. 147. The former cases are in the Supreme Court and Court of Appeals, and are as follows: *Sprague v. Blake*, 20 Wend. 61; *Baker v. Cuyler*, 12 Barb. 667; *McKnight v. Dunlop*, 1 Selden, 537, which, the principal case itself, follows. In *Boutwell v. O'Keefe* there was no question of a presumption, as the referee found as a fact that the delivery was under the contract.

man to keep the horses all winter; in the spring the government took them. This suit is for their winter keep, and, as there seems to have been a doubt whether the government did *not* make a new contract at a higher price, the burden of proof being on the claimant to show that there was no new contract in the spring, the case was remanded to allow this point of fact to be settled, and the court said: "If in this case there was a faithful performance on the part of the contractor, and a benefit received on the part of the government, there is no reason why it should not operate as a legal ratification by the defendant of the agreement, therefore the whole case turns on this subsequent transaction. If the defendants did accept the horses in the spring under the agreement made in the fall, at the same price, and in their improved condition, they must be deemed to have taken them with the burden of their winter's keeping, and, by reaping the advantages, to have ratified the obligation of their agent's agreements. On the contrary, if the claimant in the spring ignored his unbinding bargain of the fall before, selling to the defendants by a new agreement, and receiving a better price, there can be no propriety in the court affirming a transaction which the claimant has himself ignored."⁽ⁿ⁾ A tortious taking possession of goods sold is not a good acceptance.^(o)

§ 289. The delivery or acceptance must be with the assent of the other party.^(p) Where Cochrane, an agent, a defendant, acting under oral authority, delivers, without a written sale, goods to another defendant, N., and before the delivery the owner of them orders the agent to sell only under his, the seller's, direction, the Statute of Frauds applies; and when the delivery took place the goods were the property of the original owner, the sale to N. being invalid.^(q) So where the buyer took a bill of lading without the seller's consent.^(r) Where

(n) *Danolds v. United States*, 5 Ct. of Cl. 71.

(o) *Taylor v. Wakefield*, 6 E. & B. 768.

(p) *Washington Ice Co. v. Webster*, 62 Me. 355.

(q) *Lynn v. Cochrane*, 23 Low. Can. Jur. 238 (Q. B.).

(r) *Brand v. Focht*, 1 Abb. App. Dec. 185.

In a case in Maine it was said that "the taking possession of the ice with-

the buyer, contrary to the contract, took his goods prematurely, and the seller ordered them returned, but the latter afterwards adopted the contract and directed the buyer to keep the goods, there is no compliance with the Statute.(s) So where the delivery was by the seller's servant to the buyer, who refused to pay cash as the contract required, but kept the goods.(t)

§ 290. A delivery and acceptance subsequent to the contract itself is good.(u) If the contract is unrevoked(v) a subsequent acceptance of other goods than those destroyed will not, however, enable the buyer to sue a common carrier in whose hands the first goods were destroyed.(w) Nor under such circumstances would an insurer be liable on a fire policy.(x) It can be shown that the delivery and acceptance is under the contract, though part was carried out at one time and part at another.(y) It must

Subsequent
delivery
and accept-
ance.

out, or against, his consent is not a receipt or acceptance binding him. The forcible seizure of property sold, when the sale is void by the Statute of Frauds, cannot be deemed an acceptance or receipt within its provisions. If it were so, it would be to affirm judicially the rule that might makes right. Nor does the seizure of the ice by this writ of replevin, and a delivery of the same by an offer to the plaintiff, constitute a statutory receipt and an acceptance by the purchaser.

The defendant not having signed the memorandum of sale transmitted for his signature is not bound thereby. A seizure of the ice by force, or under color of legal process without payment therefor, is not a receipt or acceptance thereof within the Statute of Frauds; *Washington Ice Co. v. Webster*, 62 Me. 360.

(s) *Baker v. Cuyler*, 12 Barb. 667.

(t) *Leven v. Smith*, 1 Denio, 571.

(u) *Morse v. Chisholm*, 7 U. C. C. P.

133; *Sloan Saw-mill Co. v. Guttshall*, 3 Col. 14; *Marsh v. Hyde*, 3 Gray, 331; *Davis v. Moore*, 13 Me. 427; *Bush v. Holmes*, 53 Me. 417; *Hewes v. Jordan*, 39 Md. 481; *McCarthy v. Nash*, 14 Minn. 127; *Pinkham v. Mattox*, 53 N. H. 602; *Petrie v. Dorwin*, 4 Thomp. & Cook, 695; 1 Hun, 617; *Passaic Co. v. Hoffman*, 3 Daly, 504, 505; *Chapin v. Potter*, 1 Hilton, 368; *Van Woert v. Albany R. R.*, 1 N. Y. Suprem. Ct. 256; *Sprague v. Blake*, 20 Wend. 64; *Sale v. Darragh*, 2 Hilt. 200, following *Sprague v. Blake*, denying *Seymour v. Davis*; see *Baker v. Cuyler*, 12 Barb. 668 (doubting and citing *Seymour v. Davis*); *Amson v. Dreher*, 35 Wis. 618.

(v) *Good v. Curtiss*, 31 How. Pr. 10; see *Taylor v. Wakefield*, 6 E. & B. 768.

(w) *O'Neill v. New York R. R.*, 3 N. Y. S. C. 403; see *infra*, § 294.

(x) *Pitney v. Glens Falls Ins. Co.*, 61 Barb. 343.

(y) *Davis v. Eastman*, 1 Allen, 422.

be before action brought ;(z) delivery nine days after the contract is good.(a) So a delivery of grain in August and September, under a contract made in the preceding June.(b) A series of deliveries of goods will be assumed in absence of evidence to be independent, and not under a previous oral contract.(c) The acceptance and delivery need not be together.(d) Subsequent performance is sufficient, even though the time fixed in the contract has passed.(e) The effect of a subsequent acceptance and delivery in consummating a negotiation gives rise to questions of interest. It has been said that the effect is to make a legal contract of a mere proposition, but not to make a new contract.(f) A part delivery takes a case out of the Statute, even when made after the time fixed for the performance of a prior invalid parol contract had passed, if by the facts of the case the new contract, under which the part delivery took place, sufficiently referred to the old contract to incorporate the terms.(g) In a case in the English Common Pleas the point, under the Statute of Frauds, stated to be a nice one, but not decided, was whether, where an oral contract for the delivery of the goods at a certain price is made, disavowed, or broken, and afterwards fulfilled, the vendee, who has suffered loss by the delay in fulfilment, has any remedy against the vendor; in other words, whether there was any contract until the delivery and acceptance of the goods, or whether such delivery took the original oral contract out of the Statute. To determine this question, the counsel for the plaintiff, arguing that the writing was merely a rule of procedure, and could, therefore, be made at any time (hence a later delivery and acceptance would satisfy just as a later writing), cited *Leroux v. Brown*, as deciding that an oral con-

(z) *Fricker v. Tomlinson*, 1 M. & G. 772 (*dubitatum*); *Morgan v. Sykes*, cited in *Coats v. Chaplin*, 3 A. & Ell., N. S. 486; *Tisdale v. Harris*, 20 Pick. 13.

(a) *Whitwell v. Wyer*, 11 Mass. 9; see *Barney v. Brown*, 2 Vt. 377.

(b) *McKnight v. Dunlop*, 1 Seld. 542.

(c) *Deming v. Kemp*, 4 Sandf. Sup. Ct. 152.

(d) *Cross v. O'Donnell*, 44 N. Y. 661.

(e) *Damon v. Osborn*, 1 Pick. 480.

(f) *Lawton v. Keil*, 61 Barb. 558; *Marsh v. Hyde*, 3 Gray, 331; *Rickey v. Tenbroeck*, 63 Mo. 569; *McKnight v. Dunlop*, 1 Seld. 542.

(g) *Damon v. Osborn*, 1 Pick. 480, citing *Cooper v. Elston*, as being by inference an authority to support a subsequent delivery.

tract made in France and good there could be sued on in England, though within 29 Car. II. (*h*) A verbal sale of chattels was made on Sunday, and delivery on Tuesday following; there was no completed contract till Tuesday, therefore the Sunday statutes did not prevent recovery. (*i*) It has been held in Maine that, where there is subsequent part acceptance of chattels, the contract is valid from the time it was made, and not merely from the part acceptance. The court cited a number of instances, supported by authorities given, of the principle that the oral contract when made is valid, and if afterwards proved by a writing is enforceable. (*j*) And it has been said that a subsequent delivery and acceptance has the same effect as if made at the time of the contract. (*k*) In a late Massachusetts case it was said that "the memorandum required is the memorandum of only one of the parties; the alternative acts of the seventeenth section proceed from one only; they presuppose a contract, and are in affirmance or partial execution of it; they are not essential to its existence, need not be contemporaneous, and are not prescribed elements in its formation;" and the court added that the question presented to them was, "whether the date of the acceptance or the date of the agreement will be treated, as between the parties, as the time when the contract was made, and the risk of loss of the goods was cast on the buyer. No direct adjudication of this precise point is cited, if we except a New York case in which it seems to be held, in a *per curiam* opinion, that a loss which happened after the original agreement, and before the acceptance required by the Statute, must fall on the purchaser," and they held that the loss fell on the buyer. (*l*) Where a sale was made in Michigan of liquors, to be sent from Wisconsin to the buyers in Michigan, who were to examine them when received, delivery of the goods to common carrier in Wisconsin will not establish a contract there, and under the

(*h*) *Williams v. Wheeler*, 8 C. B. N. S. 299.

(*i*) *Bloxsome v. Williams*, 3 B. & C. 233.

(*j*) *Bird v. Munroe*, 66 Me. 341, citing cases.

(*k*) *Buckingham v. Osborne*, 44 Conn. 139.

(*l*) *Townsend v. Hargraves*, 118 Mass. 332.

Michigan liquor law any transaction in the latter state could have no effect in creating a contract.^(m)

§ 291. It has been held that acceptance may precede delivery.⁽ⁿ⁾ Thus it has been said that "there may be a receipt without any acceptance, and an acceptance without any receipt: Blackburn on Sales, 22. Of the former a familiar instance is a sale by sample, in which case the buyer may receive the goods to ascertain, before he accepts, that they agree with the samples. An instance of acceptance without receipt is where the sale is of a specific lot of goods, where the bargain itself identifies the goods as those sold, and as of the quality which the buyer agrees to buy." The court, after citing some authorities, English and American, added that: "In such case the buyer accepts when the bargain is made, though he may not receive the goods at that time."^(o) But the value of this distinction is open to doubt. In a Wisconsin case the validity of a precedent acceptance has been pushed very far; it was held that where a sale of a house as personal property was made to one then living in it, the delivery is sufficient, and satisfies the Statute of Frauds, though there was no payment or writing, the law did not require the ceremony of a moving out and in again.^(p) It is better said in a late New York case that the Statute of Frauds applied where "there was no change of circumstances, either in the parties or the goods; no change of possession or of the character of the possession, and the defendant has done no act which can be construed into an acceptance of the boiler. He has not changed its location or condition; never claimed it as his own; never refused to give it up; and, in short, has neither exercised any act of ownership over it, nor has he done anything inconsistent with his rights under his prior possession."^(q) As has already been seen, if the buyer has examined and identified the goods he buys, a de-

(m) *Rindskop v. De Ruyter*, 39 Mich. 5.

(o) *Simpson v. Krundick*, 28 Minn. 353.

(n) *Cusack v. Robinson*, 1 B. & S. 299; 4 L. T. N. S. 506; 30 L. J. Q. B. 261, citing *Morton v. Tibbett*; *Taylor v. Wakefield*, 6 E. & B. 768; (*Ex parte*) *Safford*; *Downing (Re)*, 2 Low. 564.

(p) *Snider v. Thrall*, 56 Wis. 676.

(q) *Duplex, etc., Co. v. McGinness*, 1 City Ct. Rep. 439; 64 How. Pr., 99.

livery to a carrier will work acceptance when under ordinary circumstances it would not. See *supra*, § 286. Where to make a stockholder liable to calls, an act of parliament required a written acceptance on his part of the share, it was held that a letter asking for shares and agreeing to accept them and pay calls was good, the analogy of an acceptance before delivery of goods under the Statute of Frauds being instanced.^(r) In a case in the Common Pleas Division, which turned principally on the validity of the subsequent oral alteration of a written contract, the facts were as follows: 100 tons of iron were to be all delivered before the end of July; and at the end of July but 75 tons were delivered; and in October the buyers, the defendants, requested a delivery of the 25 remaining, and it was forwarded but not to the defendant's works, and he wrote, refusing to receive it. It was held that there was no sufficient delivery and acceptance; that the request made a new contract, if it had any effect at all; that, therefore, there could not be any suit on the old contract, and that the new contract was within the Statute of Frauds.^(s) It has, however, been said that acceptance must follow, not precede the delivery.^(t) There has been a slight show of denial of the rule, that a subsequent delivery and acceptance is sufficient. In a New York case it was said: "That delivery by the seller is as essential as acceptance by the buyer. The buyer wrote to his agent, and some time afterwards the seller wrote to the agent. Held that as the seller did not participate in the act of delivery sought to be inferred from the letter, nor the buyer in that of the second, there was no delivery to comply with the Statute. Held, also, that the act of delivery with notice to the factor must be concurrent with the contract."^(u) And, in another case, Judge Sandford argued with much pains to prove that a delivery to take a case out of the Statute must be contemporaneous, and that each part performance is a separate contract.^(v)

(r) *Bog Lead Co. v. Montague*, 10 C. B. N. S. 489.

(s) *Plevins v. Downing*, 1 C. P. D. 225.

(t) *Acraman v. Morrice*, 8 C. B. 449; *Saunders v. Topp*, 4 Exch. 392.

(u) *Clark v. Tucker*, 2 Sandf. Sup. Ct. 157.

(v) *Seymour v. Davis*, 2 Sandf. Sup. Ct. 242; see *Cross v. O'Donnell*, 44 N. Y. 661.

§ 292. The delivery and acceptance of part of the goods is a compliance with the Statute of Frauds as to the whole.^(w) An allegation in the complaint that part of the goods were delivered, not denied in the answer, takes the case out of the Statute of Frauds; any part performance of a contract of sale of goods by either party takes the case out of the Statute.^(x) Part delivery and acceptance is good, though thereby the seller is enabled by perjury to impose upon the buyer more than the latter has bought.^(y) Part acceptance is sufficient, even though a part of the goods is lost.^(z) Part delivery and acceptance is good, even though an action for goods sold and delivered might not lie.^(a) A decision in the King's Bench seems to have gone the length of supporting an action for goods sold and delivered on the fact of a part acceptance: There was a bargain, whereby the defendant agreed to buy twenty hogsheads of sugar, to be prepared or filled up by the plaintiffs. Four of the twenty hogsheads were actually delivered to the defendant and accepted by him; so, as to them, there is no question. The plaintiffs did, in point of fact, appropriate sixteen hogsheads for the benefit of the defendant; that they communicated to the defendant that they had so appropriated

(w) *Descard v. Bond*, 2 Stark. Ev. (Gerhard) *488 (note *n*), Lord Hardwicke, 7 Geo. II. 132; *Thomas (Ex p.)*, Thorp (*Re*), 11 Jur., N. S. 49; *Furniss v. Sawers*, 3 U. C. Q. B. 77; *Robinson v. Gordon*, 23 U. C. Q. B. 147; *McNeil v. Kelleher*, 15 U. C. C. P. 473; *Jackson v. Fraser*, 12 Low. Can. 112; *Fagan v. Faulkner*, 5 Ark. 164; *Swigart v. McGee*, 19 Ark. 473; *Sloan Saw-mill Co. v. Guttshall*, 3 Col. 14; *Bryan v. South-western R. R.*, 37 Ga. 31; *Baker v. Farmborough*, 43 Ind. 243; *Townsend v. Hargraves*, 118 Mass. Rep. 332-3-4-5-6; *Davis v. Moore*, 13 Me. 427; *Atwood v. Lucas*, 53 Me. 508; *Rickey v. Tenbroeck*, 63 Mo. 569; *Kelsea v. Haines*, 41 N. H. 251; *Marcus v. Barnard*, 4 Roberts. Sup. Ct. 219; *Dennison v. Carnahan*, 1 E. D. Smith, 146; *Pas-*

saic Man. Co. v. Hoffman, 3 Daly, 519; *Van Woert v. Albany, etc.*, R. R., 1 N. Y. S. C. 256; *Richardson v. Squires*, 37 Vt. 640; *Danforth v. Walker*, 40 Vt. 257; *Amson v. Dreher*, 35 Wis. 618.

(x) *Dennison v. Carnahan*, 1 E. D. Smith, 146.

(y) *Davis v. Moore*, 13 Me. 427.

(z) *O'Neill v. New York, etc.*, R. R., 3 N. Y. S. C. 403.

Thus, where goods were shipped in the way generally indicated by the buyer, and upon the vessel which carried the goods being wrecked, a portion of the cargo was saved, and the buyer took and sold that portion, the oral contract was taken out of the Statute of Frauds; *Goddard v. Demeritt*, 48 Me. 211.

(a) *Atwood v. Lucas*, 53 Me. 508.

them, and requested him to fetch them away, and that he adopted that act of the plaintiffs, and said that he would fetch them away as soon as he could.(b) In an action for the non-delivery of goods sold: The plaintiff was to arrange as to their delivery; part were unloaded and accepted before he received a notice from the defendants that if not unloaded by a certain day the contract was rescinded; on that day part had been accepted by the plaintiff; the part delivery and acceptance satisfied the Statute of Frauds, and the title in goods having passed before the receipt of the notice the latter had no effect.(c) The delivery and acceptance of goods similar to, but less in amount than a certain lot sold by parol, to take the case, as to the latter, out of the Statute of Frauds must be shown to be a part of them, and delivered in fulfilment of a contract covering both; a judgment in a suit relating to the former, charging them at a different price from that of the parol agreement, is conclusive against such a contention.(d) A part acceptance of certain casks under a bill of parcels averaging ninety-seven gallons, will take the entire contract under which they are received out of the Statute of Frauds; but the number of gallons in each cask is to be taken as that in the lot accepted, the contract being silent on this point, and this though the customary hogshead was larger.(e) Where cattle sold were left with the vendor while the vendee made up his drove is *semble* not of itself sufficient delivery under the Statute of Frauds; but where the vendee took away some of the lot the delivery was sufficient to take the whole contract out of the Statute, the taking of these away indicating a dominion on the buyer's part over all of them.(f) In a New Hampshire case it was said that "acceptance of part of the property sold is by the Statute made sufficient. Can it be contended that acceptance of part is good as to the rest only when the property is so situated that the legal title to the whole passes upon acceptance of the part delivered? We

(b) *Rohde v. Thwaites*, 9 D. & R. 296 (K. B.).

(c) *Harteau v. Gardner*, 51 N. Y. 678; see *Danforth v. Walker*, 40 Vt. 283. 257.

(d) *Davis v. Eastman*, 1 Allen, 422.

(e) *Whitwell v. Wyer*, 11 Mass. 9.

(f) *Vincent v. Germond*, 11 Johns.

think not.”(g) Even where a small part of the goods being taken the buyer is not entitled to the rest, which the seller continues to hold until full payment, the Statute of Frauds is satisfied.(h) A buyer cannot select a portion and reject the residue, and then claim that the Statute of Frauds was not satisfied.(i) Where the purchaser of barrelled fish paid for some, had the barrels examined and put into good order, indicated those in worthless condition (which the seller took away), then paid for more, then a quantity were stolen from the warehouse of the seller’s agent, and then the buyer took the rest, it was held that the title in all, including those stolen, vested in the buyer; and that even without a receipt signed by the plaintiff’s agent for the first payment, stating the goods to be at buyer’s risk, they were so.(j)

§ 293. Sales by sample have given rise to some difficulties peculiar to themselves; the question generally being whether the sample delivered was accepted as part of the whole body of the goods sold. In an early English case it was said that the delivery of a sample which is no part of the commodity will not take the case out of the Statute; but if the sample delivered is to be considered as a part of the thing sold it then binds the contract. It is then an execution of the bargain. The sale in this was complete when the invoice was delivered, and the defendant afterwards took samples. He took them for his own use; they were delivered as part of the bulk, not as an ordinary sample to guide his judgment previous to a purchase, but in order to give him possession of the thing itself.(k) So it has been said, where part of the goods have been taken as a sample, there is a sufficient delivery and acceptance if the part so taken is to be estimated as part of the goods sold and to be paid for; that it was taken *alio intuitu*, i. e., for a sample, does not affect this.(l) It is for the jury to say whether the sample was delivered and

(g) Pinkham v. Mattox, 53 N. H. 602.

(j) Chase v. Willard, 57 Me. 161.

(h) Thompson v. Macirone, 4 D. & R. 620.

(k) Talver v. West, 1 Holt, 179; see

Moore v. Love, 57 Miss. 766.

(i) Hayman v. American Sponge Co., 6 N. Y. Week. Dig. 358 (N. Y. S. C.).

(l) Hinde v. Whitehouse, 7 East,

568.

accepted as part of the goods or not.(m) Where the samples are taken from the bulk of the goods purchased after the purchase, they form a part delivery and acceptance to satisfy the Statute of Frauds.(n) Where the vendee received part of the bulk of certain wheat, which was to weigh a certain amount, but which could not without including the portion so taken; this was held a good acceptance.(o) Where the sample forms no part of the goods sold, its transfer does not comply with the Statute of Frauds.(p) It is not the mere taking of a sample that will amount to a delivery. A mere taking a sample in his hand without any express understanding that such taking was to be a delivery will amount to nothing.(q) Where samples are treated by the parties as specimens only of the goods sold, a delivery of them to the buyer does not satisfy the Statute of Frauds.(r)

§ 294. The following are some examples of insufficient part delivery and acceptance. Thus an acceptance which was not with an intention to perform the whole contract and to assert the buyer's ownership under it, but, on the contrary, he immediately informed the seller's clerk that he would be responsible only for the part received(s), and so, where the part taken was not a part of that contracted for, the latter being for so many bushels after the part aforesaid had been taken.(t) In a New York case it was said that part delivery was good where the contract is of a quantity capable of division. But *secus* of a sale of a "cargo" or "load." Therefore, the plaintiffs having accepted a cargo of much less than the amount described in the contract as "about 9000 bushels," cannot sue for non-delivery of the rest.(u) Where the plaintiff, the owner of wood, carried it to a certain point at the suggestion of the defendant; when

Example of
insufficient
part de-
livery and
acceptance.

(m) *Klinitz v. Surry*, 5 Esp. 267;
Moore v. Love, 57 Miss. 766.

(n) *Gardner v. Grout*, 2 C. B., N. S.,
343, distinguishing *Simonds v. Fisher*
as a case where the sample in fact
formed no part of the goods sold.

(o) *Gilliat v. Roberts*, 19 L. J., N. S.,
Exch. 410.

(p) *Cooper v. Elston*, 7 T. R. 16;
Johnson v. Smith, Anth. N. P. 81.

(q) *Carver v. Lane*, 4 E. D. Sm. 170.

(r) *Moore v. Love*, 57 Miss. 766.

(s) *Atherton v. Newhall*, 123 Mass.
142.

(t) *Baker v. Cuyler*, 12 Barb. 668.

(u) *Flanagan v. Demarest*, 3 Roberts.
181.

there, the latter examined it and agreed to take such as was good but rejected the rest. The plaintiff alleged a contract to take all, but the defendant showed that the usage was to examine and take only the good, and for the part accepted the defendant tendered payment. A verdict against him for more was set aside, his acceptance for part did not bind him for all when qualified by a rejection, the contract itself was at issue between the parties, and was the very case that the Statute of Frauds was aimed at.^(v) In a suit by the buyer of certain cider against a common carrier in whose hands the latter had been destroyed, it was held that the plaintiff failed under the Statute of Frauds to show his title to the goods, and that the subsequent acceptance of other cider than that destroyed, and payment for that destroyed, did not relate back so as to place the title in him at the time of its loss so as to make the railroad liable to him.^(w) So in an action on a fire policy, it was held in a New York case, that the subsequent acceptance by the purchaser of that part of the wool which was saved from the fire had no effect upon the rights of the assured under the policy. For, although a partial acceptance of the property will ordinarily take the sale of the entire quantity out of the operation of the Statute of Frauds, it cannot have that effect upon that which may have previously been wholly destroyed by fire. As to that the obligations and rights of the parties become fixed whenever the destruction may take place, and the right of action arising out of the loss can afterwards only be divested by a release, payment, or satisfaction.^(x)

§ 295. A question of some delicacy arises in the not unfrequent case of a sale of several lots of goods and the acceptance of the whole or the part of one lot; in some instances the transaction covering several parcels has been considered entire, and the whole contract taken out of the Statute of Frauds by a delivery and acceptance; in others each portion has been considered as an independent matter, and the

Part delivery, etc., where several lots are sold together; examples of entire contracts.

(v) *Grover v. Cameron*, 6 U. C. Q. B. O. S. 197; see, also, *Hayman v. American Sponge Co.*, 6 N. Y. Week. Dig. 358 (N. Y. S. C.).

(w) *O'Neill v. New York, etc., R. R.*, 3 N. Y. S. C. 403.

(x) *Pitney v. Glen Falls Ins. Co.*, 61 Barb. 343.

acceptance of one as of no effect in regard to the others. The following are examples of entire contracts: Thus it was held, there being no memorandum or delivery and acceptance, that the price or value of the goods sold amounted to more than £10 under the following circumstances: the defendant bought several articles, each separately agreed upon, and no one more than £10, the whole being £70; some were measured in his presence; some he marked with a pencil, and others he assisted in cutting from a larger bulk; upon being delivered he refused to accept them; the contract was entire, and the Statute of Frauds applied.^(y) Thus, where the plaintiff sold the defendant a mare for £20, received the price, and delivered the mare; it was part of the contract that if the mare proved with foal the defendant was to return it upon the plaintiff's paying him £12; it was held that this was all one contract, and was taken out of the Statute of Frauds by the delivery.^(z) On a joint order for common and cast steel, acceptance of the former will take the whole contract out of the Statute of Frauds. In absence of other evidence, it will be assumed that one article would not have been sold at the stipulated price unless the other was taken at its stipulated price.^(a) In a New Hampshire case a contract for all the wood on a certain tract, estimated at a certain number of cords, to be taken off at a certain time, was held to be an entire contract; so that the delivery and acceptance of a part took the whole case out of the Statute of Frauds, and it was said that this was the rule even where the lot consists of different articles each with its own price.^(b) Several properties sold jointly may form an entire transaction, so as to make a part acceptance effective as to the whole.^(c) A part acceptance under an entire contract by an auctioneer of goods, belonging to several undisclosed owners, is sufficient even as to owners none of whose goods were delivered.^(d) So, where goods, as bales of hay, are capable

(y) *Baldey v. Parker*, 2 B. & C. 40.

(z) *Williams v. Burgess*, 10 A. & Ell. 502, distinguishing *Watts v. Friend* as a case of two distinct contracts.

(a) *Elliot v. Thomas*, 3 M. & W. 176; *Hodgson v. Le Bret* was thought to have been shaken by *Baldey v. Parker*.

(b) *Gault v. Brown*, 48 N. H. 185, citing cases; see *Bigg v. Whisking*, 14 C. B. 198; *Van Woert v. Albany R. R.*, 1 Th. & C. 256.

(c) *Field v. Runk*, 2 Zab. 523.

(d) *Mills v. Hunt*, 17 Wend. 333.

of division, a delivery of part, the weight, quality, etc., being marked on them, and the parties agreeing to abide by these marks, will transfer the title, under the Statute of Frauds, in the whole of the goods to the buyer, and the whole is then at his risk; the transfer was going on under the buyer's superintendence when the goods were destroyed by fire.^(e) In a case in 12th Meeson & Welsby, Lord Abinger said: "I think the order for the ready-made lamps and that given for the triangular one amounted but to one contract. Can it be said that, if a man goes to a tailor's shop, and buys a suit of clothes which are ready made, and at the same time orders another suit to be made for him, and the former are sent home to and are accepted by him, he is not bound to pay for the latter? The two statutes that have been referred to must be construed as incorporated together, and then it is plain that, where an order for goods made and for others to be made, forms one entire contract, acceptance of the former goods will take the case out of the Statute as regards the latter also."^(f)

In the Supreme Court of the United States it was said that "where goods are purchased in several parcels, to be paid for at a future day, the whole, within the meaning of the Statute of Frauds, constitutes but one contract, and the delivery of part to the purchaser is sufficient to take the case out of the operation of the Statute of Frauds." Said the court: "Apply the finding of the jury, in this case, to the conceded facts, and it shows that the defendants were in the situation of a purchaser who goes to a store and buys different articles, at separate prices for each article, under an agreement for a credit, as in this case, accepting a part, but leaving the bulk to be forwarded by public conveyance. Frequent cases of the kind occur; and it is well-settled law that the delivery of a part of the articles so purchased, without any objection at the time, as to the delivery, is sufficient to take the case out of the Statute of Frauds as to the whole amount of the goods."^(g) So where a purchase is made at an auction sale, at one time

^(e) *Bradley v. Wheeler*, 4 Roberts. 26.

^(g) *Garfield v. Paris*, 96 U. S. S. C. 566.

^(f) *Scott v. Eastern Co. R. W.*, 12 M. & W. 37.

and from the same vendor, although the articles purchased are numerous and are struck off separately at separate and distinct prices, the whole constitutes but one contract, and a delivery of part of the goods sold renders the sale valid for the whole under the Statute of Frauds.^(h) A bill of parcels, insufficient as a memorandum, may show several lots to be an entire contract, so as to make a part acceptance take the case out of the Statute.⁽ⁱ⁾ Where one sold the furniture in his hotel and his stable-stock at the same auction, and upon the same terms, etc., B. purchased a large number of separate articles, many of which were below \$33 (the amount fixed in the Statute). This was regarded as an entire contract for the whole of the property thus purchased by B. at the aggregate price, and held to be within the Statute of Frauds if the aggregate price exceeded \$33; a delivery of part would also take the whole out of the Statute.^(j) For an example of a continuous arrangement being treated as one contract, though before the delivery of the goods in suit, those previously delivered had been paid for, see the note below.^(k) Whether transactions form an entire one, or are several, is a question for the jury.^(l) For examples, generally, of transactions being treated as one entire one, see the note below.^(m)

§ 296. The following are examples of transactions regarded as separate and independent. Thus after ordering of the plaintiff's agent a cask of cream of tartar, the defendant offered to buy two chests of lac-dye. The agent said the price offered was too low, but that if the defendant did not hear by letter in a few days from the plaintiffs, he might consider the offer accepted. The plaintiffs did not write, but sent both the cream of tartar and the

Examples of transactions decided to be separate.

(h) *Mills v. Hunt*, 17 Wend. 337, saying that *Hodgson v. Le Bret* was disregarded, and *Emmerson v. Heelis* distinguished in *Baldehy v. Parker*.

(i) See *Scott v. East*, R. W., 12 M. & W. 37; *Gilman v. Hill*, 36 N. H. 311.

(j) *Jenness v. Wendell*, 51 N. H. 63, citing many cases.

(k) *O'Brien v. Credit Valley R. W.*, 25 U. C. C. P. 288.

(l) *Gilman v. Hill*, 36 N. H. 311; *Van Woert v. Albany R. R.*, 1 Th. & C. 256; *Garfield v. Paris*, 96 U. S. C. 566.

(m) *Jenner v. Smith*, L. R. 4 C. P. 276; *Gault v. Brown*, 48 N. H. 185; *Coffman v. Hampton*, 2 W. & S. 390.

lac-dye. The defendant accepted the former, but refused the latter. The court considered the bargains separate, so as not to make the acceptance of the cream of tartar take the lac-dye out of the Statute of Frauds.⁽ⁿ⁾ And in the case of a sale of apples and of barley, the former to be delivered at once, the latter as soon as it could be transported, both to be paid for on delivery, it was held to be separate; and delivery of the apples did not take the barley out of the Statute.^(o) And in another case a parol void contract was made for the delivery of goods in parcels from time to time; it was held that each delivery was a new and distinct contract, and not a part performance, or a delivery and acceptance of part so as to render valid the original contract,^(p) each instalment calling for payment upon delivery. In a New Hampshire case, the query was put whether, in the case of the sale of goods by auction, if several lots be put up separately, and separately struck off to the same purchaser, and on each occasion the auctioneer writes down the name of the vendee, there is not in point of law a distinct and independent contract as to each lot, though the purchaser afterwards sign one memorandum that he has bought several lots.^(q)

§ 297. The delivery and acceptance which satisfies the Statute of Frauds may, under certain circumstances, be symbolical instead of actual, when the latter is impossible or inconvenient.^(r) The symbolical delivery must be by some act, mere words being insufficient.^(s) There must appear an intention on the seller's part so to deliver, and on the buyer's to accept the goods, that the possession shall be changed and the title vested

Symbolic
delivery
and accept-
ance.

(n) *Price v. Lea*, 1 B. & C. 158.

(o) *Aldrich v. Pyatt*, 64 Barb. 394.

(p) *Seymour v. Davis*, 2 Sandf. 239.

(q) *Messer v. Woodman*, 22 N. H. 176. As to sales of several lots of goods at auction forming distinct contracts, see *Couston v. Chapman*, L. R. 5 Sc. & Div. App. 250, and generally as to separate sales, see *Groover v. Warfield*, 50 Ga. 651.

(r) *Chaplin v. Rogers*, 1 East, 194;

Gardet v. Belknap, 1 Cal. 401; *Johnson v. Watson*, 1 Ga. 351; *Jackson v. Catlin*, 2 Johns. N. Y. 260; *Bailey v. Ogden*, 3 Johnson, 399; *Outwater v. Dodge*, 6 Wend. 400; *Shindler v. Houston*, 1 Comst. 261.

(s) *Shindler v. Houston*, 1 Comst. 261; *Day v. New York, etc., R. R.*, 31 Barb. 552; *Audenreid v. Randall*, 3 Cliff. 113.

in the buyer.(t) In a Missouri decision it was said that, in the case of cumbersome articles not admitting of strict manual delivery, symbolic acts, which clearly signify that the dominion and control over the property has been actually transferred from the vendor to the vendee, may sometimes be sufficient.(u) The goods must be complete and ready for delivery.(v) It has been thought that the doctrine of symbolic delivery has been carried far.(w) On the subject generally of symbolical delivery, apart from the Statute of Frauds, see the cases in the note below.(x)

§ 298. The following are some examples of a sufficient symbolic delivery and acceptance: Thus, where the plaintiff, the purchaser, went into the cellar of the defendant, the seller, and selected several pipes of wines; the spills or pegs by which the wine is tasted were cut off, and the plaintiff's initials were marked on the casks by the defendant's clerk in his presence, and the plaintiff took off the gauge numbers.(y) So where iron is sold in a mass, and is too ponderous for ordinary delivery; there were ninety-three tons;(z) and the seller said to the buyer: "I deliver this iron to you at that price" (a price having been agreed upon); and the iron was, it was asserted, taken away by a third person. So the delivery of a sale-ticket giving, by custom, the buyer full control of the goods,(a) or the key of a warehouse.(b) Branding and pressing hay.(c) The selecting and marking of trees, by the buyer, to be cut at once.(d) So where the seller of timber allowed the buyer to measure it,

Examples
of sufficient
symbolic
delivery,
etc.

(t) Carver v. Lane, 4 E. D. Sm. 170; (y) Anderson v. Scot, 1 Camp. 235,
Johnson v. Smith, Anth. N. P. 81; note.
Quintard v. Bacon, 99 Mass. 186. (z) Calkins v. Lockwood, 17 Conn.

(u) Harvey v. St. Louis Butch. Ass., 174.
39 Mo. 217.

(v) Lamson v. Patch, 5 Allen, 586.

(w) Bailey v. Freeman, 11 Johns. 261; Chaplin v. Rogers, 1 East, 194.
223; Johnson v. Smith, Anth. N. P. 81. (c) Dyer v. Libby, 61 Me. 45; Brad-

(x) Stanton v. Small, 3 Sandf. 230; ley v. Wheeler, 4 Roberts. 26.

Boynton v. Veazie, 24 Me. 286; Willes (d) Byassee v. Reese, 4 Metc. (Ky.)
v. Ferris, 5 Johns. 344; Benford v. 373.

Schell, 55 Penn. St. 395; Jewett v.
Warren, 12 Mass. 300.

mark it with his initials, and spend money in having it squared.(e) So where standing trees were sold by writing to a buyer, who cut and removed some, and orally resold the rest to the original seller, the rule of symbolic delivery, etc., was applied.(f) So where the parties went upon piles of lumber, and the vendor pointed out to the vendee that it was the latter's, and marked with his name, and the vendee agreed to take it then, though the vendor offered to pay for the expense of removing.(g) Writing one's name on linen bought binds the vendee, if this was done to denote purchase and to appropriate the goods.(h)

§ 299. The following are some examples of insufficient symbolic delivery, etc.: Thus, a direction by the buyer to alter the marks and to send them to the docks is insufficient without more.(i) So taking samples of wines and writing the prices on the labels.(j) So the delivery by an out-going tenant of the key of the leased premises to the landlord is not a sufficient delivery, etc., of goods there, which had been orally sold by the lessee to the lessor.(k) So the delivery of brass-knobs for the horns of cattle is not a sufficient delivery, etc., of cattle sold.(l) So pointing at certain standing wheat.(m) So where the parties being within sight of hay-stacks the seller said: "The hay is yours," and the buyer said "yes."(n)

§ 300. The most common instance of symbolic delivery is that by the transfer of a written evidence of title. Thus it is sufficient where the seller gave a bill of parcels and a certificate that he held on storage, and the buyer gave his note.(o) The delivery of a bill of lading is a sufficient symbolic delivery, etc.,

Delivery,
etc., by
orders
generally,
and exam-
ples.

(e) *Cooper v. Bill*, 3 H. & C. 729.

(f) *Smith v. Bryan*, 5 Md. 141.

(g) *Woodford v. Patterson*, 32 Barb. 630.

(h) *Hodson v. Le Bret*, 1 Camp. 234;
Kealy v. Tenant, 13 Ir. C. L. 395.

(i) *Bill v. Bament*, 9 M. & W. 40.

(j) *Simonds v. Fisher*, cited in *Gar-
dner v. Grout*, 2 C. B., N. S. 342.

(k) *Proctor v. Ambler*, 1 Can. Law
T. 608 (Ont. Ct. App).

(l) *Clark v. Draper*, 19 N. H. 422.

(m) *Jarvis v. Sutton*, 3 Ind. 289.

(n) *Hallenbeck v. Cochran*, 20 Hun,
420.

(o) *Chapman v. Searle*, 3 Pick. 46;
see *Bass v. Walsh*, 39 Mo. 198.

of the goods.(p) The following are some examples of insufficient symbolic delivery, etc., by means of certificates, receipts, etc. Thus, where one (*semble*, a military officer) burning cotton gave a delivery receipt to the payee of a certain note which was to be cancelled or paid upon delivery of the cotton, the Statute of Frauds is not satisfied.(q) So, under a sale of certain bank-bills for cash, an order given on the depositing of the notes is not without more a compliance with the Statute of Frauds.(r) For other examples of insufficient delivery by this means, see the note below.(s) An unaccepted bill of parcels is not a compliance with the Statute of Frauds.(t) Or the mere receipt by mail of a bill of goods.(u) So, where the seller sent a bill rendered, and a bill of lading to the buyer who refused to pay for the goods the price stated in the bill, but kept the bill of lading, there was no compliance with the Statute.(v) So, where a bill of lading was accepted by an intermediary agent who had no authority to bind the buyer, the latter knowing of the receipt of the bill and saying nothing, the goods were lost *in transitu* before reaching even the agent just spoken of.(w) Generally as to delivery by order apart from the Statute of Frauds, see the note below.(x) There must be both a delivery and acceptance of an order if the latter is to be a compliance with the Statute of Frauds.(y) The following are some examples of the order being an insufficient compliance with the Statute. Thus, where the order showed that actual delivery of the goods was agreed upon,(z) or where the goods are not under the control of the parties, but under that, for example, of the government, as in a case in 2 Sawyer, where the court, quoting the revenue laws, said:

- (p) Rawls v. Deshler, 3 Keyes, 572; (v) Brand v. Focht, 1 Abb. App. 188.
 4 Abb. Dec. 12; 28 How. Pr. 66; (w) Meredith v. Meigh, 2 E. & Bl.
 Audenreid v. Randall, 3 Cliff. 113; 370, overruling Hart v. Sattley.
 Johnson v. Cuttle, 105 Mass. 449. (x) Cushing v. Breed, 14 Allen, 380;
 (q) Kaufman v. Stone, 25 Ark. 346. Williams v. Evans, 39 Mo. 201; Hodges
 (r) Gooch v. Holmes, 41 Me. 528. v. Harris, 6 Pick. 361.
 (s) Tisdale v. Harris, 20 Pick. 13; (y) Shindler v. Houston, 1 Comst.
 King v. Jarman, 35 Ark. 196. 264, commenting on Searle v. Keeves
 and Hollingsworth v. Napier.
 (t) Smith v. Mason, Anthon, 164. (z) Franklin v. Long, 7 G. & J. 416.
 (u) Pike v. Wieting, 49 Barb. 318.

“From the foregoing laws and regulations, it is plain that goods subject to duty, stored in a warehouse, are *de jure* and *de facto* in the possession of the government, and that possession cannot be divested by an attachment at the suit of the creditor of the importer, nor by the officer in charge, nor by the importer, except in the manner provided for by law. The officer is in no sense the bailee of the importer, and no attornment by him to a third person by order of the importer can have any effect to change the possession of the goods. Admitting, then, that in ordinary cases an endorsed warehouse receipt, or a delivery order of a warehouseman accepted by the latter, will operate to transfer the possession, or be good as a constructive or symbolical delivery of the goods, the delivery order in the case at bar can have no such effect, for the importer had no right to order the delivery, and the warehouseman had no right to make it. To hold otherwise would involve the absurdity of supposing that there may be a good constructive delivery by means of certain documents where an actual delivery is legally impossible.” And the court added that the seller may have intended to take advantage of this rule to have control of the goods in case of the vendee’s insolvency.(a) Where the goods are not susceptible of immediate delivery, the transfer of an order is no delivery, etc.(b) The goods could not in the special case be at once taken from the vessel where they were, and before anything further was done the buyer refused them. The delivery of an order is not sufficient under a contract for the delivery of the goods on a day certain, notwithstanding a custom that an order is delivery.(c) The order itself must be delivered. The mere endorsement therefore of a bill of lading without a delivery of it will not transfer title in the goods.(d) So the acceptance of a draft on a consignment is not sufficient where the bill of lading has not been given up.(e)

(a) Clifford (*In re*), 2 Sawy. 432.

(d) Buffington v. Curtis, 15 Mass.

(b) Stevens v. Stewart, 3 Cal. 140. 533.

(c) Suydam v. Clark, 2 Sandf. 133

(e) Ralph v. Stuart, 4 E. D. Smith,

(a case not affected by the Statute of 627.

Frauds).

§ 301. The following are some examples of an order, which from being properly accepted by the person on whom it is given, complies with the Statute of Frauds as working a delivery and acceptance of the goods themselves. Thus, a carrier's receipt handed by the seller to the buyer; (*f*) and so where the seller, under a verbal contract, had delivered goods to a carrier, and taken a delivery order to himself, and then made a delivery order to the buyer and notified the company, who accepted the latter order and took from the buyer directions as to the delivery, it was held that, notwithstanding the Statute of Frauds, the title to the goods was in the buyer, and the goods could not be attached in the carrier's hands as the property of the seller; (*g*) so where wheat was taken to an elevator, belonging to B., a third party at the request of the defendant and for his account, and B. as agent for the latter, compared the wheat with the samples and receipted to the plaintiff for the wheat according to usage, and the plaintiff endorsed the receipts and delivered to B. an order to deliver these to the defendant; B. offered to deliver the receipts and the wheat, and the defendant asked him to keep these for a few days; a measurer sent his returns to the plaintiff, who delivered them to the defendant, who kept them for several days, and then declined the wheat; (*h*) so where in the sale of a horse word is sent by the parties to a person who had the animal at livery; (*i*) so where the seller delivered to the buyer a schedule of marble sold in bulky amounts, and the buyer arranged with third parties, who had custody of it, under what terms they were to keep it. (*j*) Delay in sending back a bill of lading may amount to an acceptance of the goods; (*k*) so where the buyer of goods took a delivery order and sent his servant with horse and cart for part of the goods, which a warehouseman handed over, but which on inspection the buyer rejected, because of their bad quality, it was held to be delivery and acceptance, and that

Examples
of orders
accepted.

(*f*) Bank of Rochester v. Jones, 4 N. Y. 506.

(*g*) Hatch v. Lincoln, 12 Cushm. 33.

(*h*) Dows v. Montgomery, 5 Roberts. 453.

(*i*) Tuxworth v. Moore, 9 Pick. 347.

(*j*) Dixon v. Buck, 42 Barb. 73.

(*k*) Borrowscale v. Bosworth, 99 Mass. 381; Currie v. Anderson, 2 E. & E. 600; 29 L. J. Q. B., 90.

the buyer was bound for the whole quantity; *semble*, that under these circumstances the buyer should have examined the goods in the warehouseman's hands.^(l) Where the buyers bought from one Rich, a broker, known to them to be such, and after the sale he soon returned to them with the plaintiff's warehouse delivery order for the ten casks, which order he delivered to them; that they received and retained it and requested Rich to sell the goods for them if he could get a profit; and the buyers acknowledged themselves as owners and examined the goods, the compliance with the Statute of Frauds was held to be sufficient.^(m) It has been suggested that the acceptance of the order by the person to whom it is addressed, is not absolutely necessary in order to satisfy the Statute of Frauds; thus in a case in 3 Clifford, speaking of bills or orders, the court said: "Assent by the party, however, in whose custody the goods are, it is said, is necessary to constitute an acceptance and receipt under the Statute of Frauds; but if the parties agree that he shall, as between them, be considered the bailee of the buyer, it is not perceived how the acts of the bailee can defeat the sale;"⁽ⁿ⁾ and in a case in 2 Espinasse, the giving of a delivery order was held to be a sufficient delivery, etc., though before the warehouseman actually delivered the goods the order was revoked.^(o) After a delivery order given, goods are not in the order and disposition of the giver of the order within the meaning of the bankrupt act; though the act of bankruptcy took place before the goods were actually delivered.^(p)

§ 302. The following are examples of an order being no compliance with the Statute of Frauds, because not accepted by the person to whom it was addressed: Thus, an order on the sheriff, who has the slave, the

Examples
of orders
not ac-
cepted.

(l) Baylis v. Lundy, 4 L. T. N. S. 176 (K. B.). houseman, see Harman v. Anderson, 2 Camp, 244.

(m) Hankins v. Baker, 46 N. Y. 670, citing cases.

(n) Audenreid v. Randall, 3 Cliff. 113; citing Bentall v. Burn, 3 B. & C. 423; Farina v. Home, 16 M. & W. 119.

(o) Searle v. Keeves, 2 Esp. 599; as to effect of acceptance by the ware-

(p) Tucker v. Ruston, 2 C. & P. 87; see Maxw. Stat. (2d ed.), 47, saying that the bankrupt act and the Statute of Frauds are not in *pari materia*, and that one is no guide to the other; see Humble v. Mitchell, 11 A. & Ell. 205.

article sold, in custody, is not such a delivery, actual or constructive, of the slave as would satisfy the 17th section of the Statute of Frauds, for the sheriff may not honor the order.(q) So a warehouse order not accepted by the warehouseman;(r) or where the forms required by the latter have not been complied with, so as to give the buyer the control of the goods.(s) So an order not presented.(t) So the receipt of a bill of lading by the vendee's clerk is no acceptance without evidence of authority in the clerk to accept; before the defendant knew the bill had been left he notified the plaintiff that he would not accept.(u) The necessity of an acceptance of the order is thus stated in a case in 3 Barnwell & Cresswell: said the court: "There could not have been any actual acceptance of the wine by the vendee until the dock company accepted the order for delivery, and thereby assented to hold the wine as the agents of the vendee; they held it originally as the agents of the vendors; and as long as they continued so to hold it the property was unchanged. It has been said, that the London Dock Company were bound by law, when required, to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him until he actually took possession of them;" the mere acceptance of the order would not therefore satisfy the Statute of Frauds.(v) So where under a contract of sale of certain bank-bills for so much cash, an order was given to the defendant on the depository of the notes, it was held not a delivery to take the case out of the Statute of Frauds; the bills might have been levied on as the vendor's property, or been redeemed or destroyed, etc., before the order was presented; the defendant in fact never received the bills.(w) In a late New York case the court said: Assuming, as it may properly be done, that the accept-

(q) *Franklin v. Long*, 7 G. & J. 407.(r) *Boardman v. Spooner*, 13 Allen, 357.(s) *Zachrisson v. Poppe*, 3 Bosw. 171; see *supra* (*Re*), Clifford, 2 Sawy. 432.(t) *Gooch v. Holmes*, 41 Me. 523.(u) *Quintard v. Bacon*, 99 Mass. 186.(v) *Bentall v. Burn*, 3 B. & C. 426.(w) *Gooch v. Holmes*, 41 Me. 523.

ance of the bill of lading by the defendant, under ordinary circumstances, would have been equivalent to the acceptance of the property mentioned in it, yet that could not be the effect of it where, as in this case, the property had been previously lost; certainly not unless the acceptance was made with knowledge of the circumstances affecting the propriety of it existing at the time it occurred.(x) Where goods were sent from abroad to the plaintiff's agent, who deposited them with a wharfinger, who gave the agent a delivery order, assignable; the agent endorsed this order to the defendant, who kept it for several months, but refused to deliver the goods, and excused himself from sending back the order by saying that he had left it with his solicitor; this was held no sufficient delivery and acceptance to satisfy the Statute of Frauds; the wharfinger held as agent for the consignor, and his possession was that of the agent of the consignor; and until the wharfinger recognizes the assignee of the order there is no delivery, even constructive, to the latter.(y)

§ 303. The question whether there was a delivery and acceptance in any given case is one for the jury under the guidance of the court.(z) When there was sufficient evidence of delivery and acceptance to go to the jury a court in error will not allow the defence of the Statute of Frauds, if the jury have found such delivery and acceptance.(a) There must, however, be evidence enough to justify a verdict;(b) and in a late New Hampshire case it was said that in cases where the court have been of opinion that there was no evidence (no acts of ownership) from which the jury could legally find an acceptance, the question has been

The question of delivery, etc., is for the jury.

(x) *Rodgers v. Phillips*, 40 N. Y. (1 Hand) 523.

(y) *Farina v. Home*, 16 M. & W. 122.

(z) *Smith v. New York R. R.*, 4 Keyes, 198; *Gray v. Davis*, 10 N. Y. 285; *Bailey v. Ogden*, 3 Johns, 418; *Houghtaling v. Ball*, 19 Mo. 84; *Atwell v. Miller*, 6 Md. 18; *Dyer v. Libby*, 61 Me. 45; *Kelsea v. Haines*, 41 N. H. 251;

Bushell v. Wheeler, 15 A. & Ell., N. S., 445, note; *Parker v. Wallis*, 5 E. & Bl. 26; *Phillips v. Bistolli*, 2 B. & C. 513; *Blenkinsop v. Clayton*, 7 Taunt. 598; *Taylor on Evid.* (5th ed.), 55, citing *Lillywhite v. Devereux*, 15 M. & W. 291.

(a) *Johnson v. Watson*, 1 Ga. 351.

(b) *Stone v. Browning*, 68 N. Y. 600.

treated and determined as one of law ;(c) and the court added : “ It is not impossible but that some of the subtle and nice distinctions raised and adopted in reference to the matter of acceptance, of which Chancellor Kent complained nearly half a century ago (2 Kent, Com. 495), and some of the apparent, if not real, confusion and conflict in the English cases since that time might have been avoided, had the question of acceptance, which in its essence is purely a question of fact, been uniformly sent to the jury under suitable instructions as to the law. I am satisfied that the most careful examination of the great mass of cases, where the fact of acceptance has been determined one way or the other by the court, will not result in the discovery of any uniform rule ; that such examination can be little more useful or satisfactory than the examination of a thousand verdicts relating to the same subject matter, together with the evidence upon which they were found.” An examination of the cases cited in this chapter will, it is thought, amply confirm the view of the New Hampshire court. It may be said, in closing this chapter, that the English law on the subject of delivery and acceptance is very contradictory.(d)

(c) *Pinkham v. Mattox*, 53 N. H. 602, (d) *Jackson v. Fraser*, 12 Low. Can.
citing many cases. 112.

CHAPTER XI.

PUBLIC AND QUASI-PUBLIC SALES.

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| <p>§ 304. Judicial sales in general.</p> <p>§ 305. Sales by a master, etc.</p> <p>§ 306. Administrator's, etc., sale.</p> <p>§ 307. How far confirmation by the court necessary.</p> <p>§ 308. Further consideration as to judicial sales.</p> <p>§ 309. Sheriff's sales.</p> <p>§ 310. Memorandum of a sheriff's sale, and who shall make it.</p> <p>§ 311. The nature of the memorandum; the sheriff's return.</p> <p>§ 312. When memorandum must be made.</p> | <p>§ 313. Sheriff's certificate and his deed.</p> <p>§ 314. Auction sales.</p> <p>§ 315. Auctioneer agent for both parties to make memorandum.</p> <p>§ 316. Parol authority to auctioneer.</p> <p>§ 317. When memorandum of auction sale must be made.</p> <p>§ 318. Memorandum by auctioneer's clerk.</p> <p>§ 319. Who may act as auctioneer, and who may sue on the memorandum.</p> <p>§ 320. Requisites of an auctioneer's memorandum. Examples.</p> |
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§ 304. JUDICIAL sales are not within the Statute of Frauds,^(a) because being under the control of the court the facts of the contract can be ascertained by juridical means as certain as the proof which establishes the writing required by the Statute; and, as will be seen, written evidence of a satisfactory character is always a feature of such sales. In a case in the King's Bench of Upper Canada it was suggested that an execution sale was not within the Statute of Frauds, because there was no contract in the matter; but this

(a) *Attorney-General v. Day*, 1 Ves. Sr. 220; *Blagden v. Bradbear*, 12 Ves. 471; *White v. Crew*, 16 Ga. 421; see, however, *Rev. Code*, 1873, § 2621; *Barney v. Patterson*, 6 Harr. & J. 204; *Wiley v. Robert*, 27 Mo. 388; *Evans v. Ashley*, 8 Mo. 177; *Alexander v. Merry*, 9 Mo. 514; *Jackson v. Catlin*, 2 Johns. 259; *Catlin v. Jackson*, 8 Johns. 531; *Simons v. Catlin*, 2 Caines, 61; *Hege- man v. Johnson*, 35 Barb. 203; *Tate v. Greenlee*, 4 Dev. 154 (*dictum*); *Anderson v. Chick*, *Bailey's Eq.* 118; *Christie v. Sampson*, 1 Rich. 407; *Elfe v. Gadsden*, 2 Rich. 373; see *Boykin v. Smith*, 3 Munf. 102; see *Rorer on Judicial Sales*, 2d ed., § 136.

view is not supported by other authority.(b) As was said in *Attorney General v. Day*, that while some exceptions to the Statute are based on fraud, others are sustained because of the absence of the danger of perjury.(c) The same principle appears in the civil law as it exists in Louisiana; an adjudication or procès-verbal, signed by the judicial officer, binds the parties to the contract, though they may execute no writing.(d) The signed declaration of the officer is made by law to supply the written assent of the purchaser, while that of the seller must be given previous to the exposure of the property for sale.(e) A refusal to comply with the terms of a judicial sale would moreover be a contempt, and there is the written report of the officer making the sale.(f) An Orphans' court sale is not within the Statute of Frauds.(g) Where the officer of the court sells by auction, and makes an auctioneer's memorandum, see §§ 314-319.

§ 305. Masters' sales are not within the Statute of Frauds,(h) as the master is a mere instrument of the court, and all that he does requires confirmation.(i) Where the defendant had promised to bid at a judicial sale on behalf of the plaintiff and a third person and himself, the court said that the Statute of Frauds had nothing to do with the case, for it related to "a contract for a sale and a judicial sale, which may be by parol between the clerk and master on the one hand, and the joint-purchasers on the other." (j) A sale by com-

Sales by a
master,
etc. etc.

(b) *Haydon v. Crawford*, 3 U. C. K. B., O. S. 588.

(g) *Fulton v. Moore*, 25 Pa. St. 479.

Verbal orders by a court for a sale in partition and for a resale, when the purchaser has not complied with the terms of his contract, are invalid; *Pratt v. Bentley*, 4 Rich. 20; and it was even said in *Bicknell v. Byrnes*, 23 How. Pr. 488, that masters' sales are within the Statute, which will apply if the officer does not sign.

(h) *Attorney-General v. Day*, 1 Ves., Sr. 220 (a sale in chancery of land left in charity, and in order to carry out the charity); *Jenkins v. Hogg*, 2 Const. Rep. (So. Car.) 830 (*dictum*); *Watson v. Violet*, 2 Duvall, 333 (saying that the Statute "does not in terms or spirit embrace sales made by decree of courts"); see 1 Sugd. on Vend., p. 109.

(c) 1 Ves., Sr. 220.

(i) *Smith v. Arnold*, 5 Mason, C. C.

(d) *Freret v. Meux*, 9 Robins. 416; *Faulk v. Pinnell*, 6 Robins. 826.

414; *Bozza v. Rowe*, 30 Ill. 200, and see § 307.

(e) *Freret v. Meux*, *supra*.

(j) *Trice v. Pratt*, 1 Dev. & Bat. Eq.

(f) *Linn Boyd Co. v. Terrill*, 13 Bush, 464.

628.

missioners in partition is not within the Statute, because it must be reported to the court; the importance of this feature in determining the character of a sale is important, as will be seen later.*(k)* Nor is a sale by a referee under a judgment.*(l)* Doubt has been thrown upon the general point in New York.*(m)* Sales by school commissioners are within the Statute of Frauds;*(n)* also a sale of public land by loan-officers selling by special authority given by Statute.*(o)* So a sale by town trustees.*(p)*

§ 306. The weight of authority is in favor of treating the sale by an administrator as within the Statute of Frauds, the reasons for making an exception of real judicial sales not applying to it. The leading case on the subject is a decision of Judge Story's,*(q)* in which it is said that an administrator's sale is not a judicial sale; the sales in chancery are carried through at every step under the eye of the court, and every party has an opportunity to object, but the court exercises no control over an administrator's sale, and the sale does not come before the court for confirmation, and the administrator has merely to account to the court for the proceeds. An administrator's sale, it has been held in another case, differs from a master's sale, in that the master is a mere instrument of the court, and because the bid

Adminis-
trator's,
etc., sale.

(k) Hutton v. Williams, 35 Ala. 515; see Smith v. Arnold, 5 Mason, C. C. 414; Bozza v. Rowe, 30 Ill. 200, and see generally § 307 as to this point of the confirmation by the court.

(l) Willets v. Van Alst, 26 How. Pr. 341.

(m) Simonds v. Catlin, 2 Caines, 61 (doubting Lord Hardwicke's rule in Attorney-General v. Day, and saying that the latter was a case where the assent of the parties was made upon the record); in Simonds v. Catlin the sale was by the sheriff; see Bicknell v. Byrnes, 23 How. Pr., saying that masters' sales are within the Statute. But see National Fire Ins. Co. v. Loomis, 11 Paige, 433, where there is a *dictum*

to the effect that since under the 2 Revised Statutes, 135, § 8, the purchaser does not have to sign, but only the party making the sale, the master's written report stating the contract should be sufficient; see Ennis v. Waller, 3 Blackf. 472, following the *dictum* in Simonds v. Catlin.

(n) Hutton v. Williams, 35 Ala. 515; State (*Ex rel.* Crampton) v. Commissioners, 14 Wis. 347; Gough v. Dorsey, 27 Wis. 127.

(o) Jackson v. Bull, 2 Caines, 301.

(p) Thomas v. Trustees of Harrodsburg, 3 Marsh. 299.

(q) Smith v. Arnold, 5 Mason, C. C. 414, followed in Dawson v. Miller, 20 Tex. 173; see 2 Law Intellig., 21.

made at his sale is not binding till confirmed by the court.^(r) Where an executor's sale is under an order of the probate court, and must be confirmed by the latter, the Statute of Frauds does not apply.^(s) But in Iowa such a sale, though under order of court, is within the Statute of Frauds, and the administrator cannot make the memorandum because he has too much interest.^(t) In Georgia, by statute, no writing under the Statute of Frauds is required in the case of sales held by executors, administrators, guardians, or sheriffs.^(u) But it has been held in Pennsylvania that an administrator's sale is not within the Statute of Frauds.^(v) As conducted in Louisiana, administrator's sales appear to be genuine judicial sales, and the written evidence executed to be equivalent to the writing required by the Statute of Frauds; see *infra*, § 307.^(w) A trustee's sale is within the Statute of

(r) *Bozza v. Rowe*, 30 Ill. 200.

(s) *Halleck v. Guy*, 9 Cal. 196, distinguishing *Smith v. Arnold* as a case where no confirmation of the court was necessary. In *Wolfe v. Sharpe*, 10 Rich. So. Car. 63, where the administrator sold at auction by order of court, and the auctioneer made the memorandum, the case comes within the ordinary rules of auction sales. The court said: "The cases of *Wolfe v. Sharpe*, 10 Rich. So. Car. 63, *Catheart v. Keirnaghan*, 5 Strob. 129, and *Simmons v. Anderson*, 7 Rich. 67, sufficiently show that sales by administrators are not governed by the rule of *Entz v. Mills*, 1 McMul. 453, and that an entry made by the clerk of the administrators, etc., in conformity to the results announced by the crier in the presence and hearing of all concerned, is sufficient. The administrator and administratrix, it must be remembered, sold under authority of the ordinary. His order, like the decree in chancery, authorized the sale and fixed the terms, and hence all persons, the crier and clerk who are necessary to make the sale, may well be regarded as the

agents of the administrator and administratrix, the vendors, and the purchasers—the vendees. Such is the invariable usage, and it would produce immense confusion to decide against it."

(t) *Wingate v. Herschauer*, 42 Ia. 507, citing *Bent v. Cobb*, and see §§ 310, 319.

(u) *Sanderlin v. Trustees of R. C. Church*, R. M. Charlton Rep. 552.

(v) *King v. Gunnison*, 4 Penn. St. 171, the court saying that by custom in Pennsylvania in an administrator's sale, there was no other writing than the return of the administrator to the order of sale and its confirmation by the court. "A written contract between the administrator and the purchaser would be without value before the sale was confirmed, and totally useless when it was confirmed." *Cash v. Tozer*, 1 W. & S. 519, was relied on as deciding that sheriff's sales are not within the Statute of Frauds, which it does not do; see *Rorer on Jud. Sales*, 2d ed. § 136.

(w) *Brooks v. Walker*, 3 La. Ann. 152; *Bushnell v. Brown*, 8 Martin, N. S. 158.

Frauds.(x) But the rule is otherwise when the trustee sells under a decree in chancery.(y) A written advertisement or notice of his sale signed by the trustee is not sufficient under the Statute of Frauds, because it is intended to show not a sale, but a purpose to sell, and the memorandum under the sale must be made at once; see § 312.(z)

§ 307. That it is because a judicial sale is under the control of the court the Statute of Frauds does not apply, is clear, but whether the master's memorandum satisfies the Statute, or whether a confirmation by the court is essential, is not so clear. It will not be contended that the Statute of Frauds requires that a master's sale should be confirmed by the court, but it is said that such confirmation is the reason for excepting this species of sale from the general rule, and no one will now probably deny that a confirmation should have that effect. The question, however, that remains is, whether a confirmation by the court is essential; whether the master has power to make the memorandum under the Statute, and whether, if such memorandum is part of the record, it is not sufficient even if not signed by him; what should be the nature of the memorandum made by him is a further consideration. The confirmation by the court will, without there being a memorandum signed by the master, take the sale out of the Statute of Frauds.(a) That the confirmation was the only efficacious circumstance was strongly urged in an Alabama case.(b) There

(x) *Ingram v. Dowdle*, 8 Ired. (N. C.) 456; *White v. Watkins*, 23 Mo. 426.

(y) *Harrison v. Harrison*, 1 Md. Ch. Dec. 335 (citing cases).

(z) *White v. Watkins*, 23 Mo. 426 (denying *Hobby v. Finch*, Kirby, 14).

(a) *Attorney-General v. Day*, 1 Ves. Sr. 220; in *Simonds v. Catlin*, 2 Caines, 61, Chancellor Kent thought that the assent by the parties in the former case, being made part of the record, was the fact which satisfied the Statute, and that masters', etc., sales are always consummated by a conveyance.

(b) *Hutton v. Williams*, 35 Ala. 515; citing *Attorney-General v. Day*, *Blagden v. Bradbear*, *Smith v. Arnold*, *Gordon v. Sims*, *Brent v. Green*; *Sugden on Vendors*, p. 135, and *Browne on S. of F.*, § 265, and observing that in *Simonds v. Catlin*, Kent passed by the question of confirmation; see *Jenkins v. Hogg*, 2 Const. Rep. 834; *Bozza v. Rowe*, 30 Ill. 200, and *Smith v. Arnold*, *supra*. In a bankruptcy case in England the importance of the confirmation of a master's sale was made the ground of distinction between such sale and the one before the court, it was

is a difference between the proof of an equitable title and that of the full legal title, the latter requiring a decree of the court, while the former does not necessarily do so. Thus it was held that where one bought land at a judicial sale, and was let into possession, he could not defend himself at law when sued upon notes given for the purchase-money, upon the ground that till a decree of the court directing title to be made to the vendee was made, the title was still in the former owners.^(c) And where a decree in divorce transfers real estate from one party to another, the judgment roll should contain a description of the land.^(d) In Louisiana, where the judge conducts

said that: "Now, in judicial sales before the master the purchase is completed before him, not at the chambers of the solicitors; and the court alone, and not the vendors, can annul the sale or decree interest to be charged, and in case of errors or misdescription the master, under the direction of the court, makes an allowance, and not the vendor. The consequence of these circumstances is that, even if I thought the court of review had jurisdiction by analogy to the jurisdiction of this court, still I should say such analogous jurisdiction could be exercised only by borrowing the forms used on such occasions by this court, which has not been done. On sales before the master there is no binding contract till the master's report is confirmed; here the parties were bound by signing the agreement of sale. In chancery the proceeding is not concluded till the master's report is confirmed, which is proved by the fact that till then the biddings may be opened on a proper case made; in the present case the agreement was conclusive. Sales before the master are not within the Statute of Frauds, which is not the case under such sales as the present."

Ex parte Cutts; *Re Goren*, 3 M. & Ayr. 575.

(c) *Worthington v. McRoberts*, 7 Ala. 816, the court said: "We understand the objection to the proceeding in the Orphans' Court to be, that there was no order made by the court directing the title of the land sold under its order to be made to the purchasers; it is doubtless correct that until such order is made the title of the heirs is not divested, as was held in *Lightfoot v. Lewis's Heir*, 1 Ala. Rep. 475, and again in *Bonner v. Greenlee's Heir*, 6 Ala. Rep. 411; but that would be no defence to an action on notes. In *Rhodes, Adm'r, v. Storr*, at the present term, we held that a recovery could be had upon a promissory note given for the purchase of land, although the land had not been conveyed, and there was no memorandum or note, in writing, by the vendor of the terms of the contract. That case is certainly as strong as the present. Here the land was sold by order of the Orphans' Court, the notes executed for the purchase-money, the sale approved by the court, and the purchaser let into possession." See *White v. Beard*, 5 Porter, 100, as to liability of vendee on notes given for price of land sold by parol.

(d) *Bamford v. Bamford*, 4 Or. 35.

the entire proceeding, his memorandum is plainly sufficient.(e) The memorandum made by the officer selling, as, *e. g.*, a master in equity, is sufficient *semble* without more;(f) or, again, a certificate is sufficient given by the referee who sold under the foreclosure of a mortgage.(g) When a sale of school lands is made in Wisconsin the statute authorizes and directs the commissioners to give a certificate of sale.(h) So in an analo-

(e) *Faulk v. Pinnell*, 6 Robin. 26, where it was held the *procès-verbal* of adjudication, annexed to the plaintiff's petition, is only signed by the parish judge; and although this court has several times held that the *procès-verbal* of the adjudication of property sold by the court of probates is evidence of the sale, and that no act under the signature of the parties is necessary to perfect it (5 Mart. 372); and that the *procès-verbal* of a sale, made by the parish judge, in which a mortgage is retained and duly recorded, is full evidence of the mortgage (2 La. 460); still such evidence, for the purpose for which it was used, in our opinion, must be of the nature required by law for the issuing of executory process thereon, as if it were of a different character it would not import a confession of judgment (Code of Practice, art. 733); and *Freret v. Meux*, 9 Robin. 416, where, speaking of art. 2586 of the Civil Code, the court said this article provides that "the adjudication is the completion of the sale, the purchaser becomes the owner of the object adjudged, and the contract is from that time subjected to the same rules which govern the ordinary contract of sale." In judicial sales the adjudication is, of itself, a complete title, and need not be followed by an act passed before a notary (ib. art. 2601); although, in auction sales of real estate, an act of sale is to be passed, yet the *procès-verbal* or certificate of adjudication, drawn up by the auctioneer, is as binding on the

parties as would be an agreement to sell in writing. The signed declaration of that officer is made by law to supply the written assent of the purchaser, while that of the seller must be given previous to the exposure of the property for sale; and *Brooks v. Walker*, 3 La. Ann. 165, holding that as the *procès-verbal* of an administrator's sale stated that the land sold was to be held as mortgaged for the price, and this is sufficient to create the mortgage, the *procès-verbal* being signed by the purchaser and the parish judge, though not signed by the administrator or his agent.

So a *procès-verbal* of a sale by the register of wills in New Orleans is evidence of title; *Bushnell v. Brown*, 8 Martin, N. S., 158. A parish judge, selling real estate of a decedent, perfects his sale by signing the *procès-verbal*, until then the evidence is incomplete; *Jackson v. Williams*, 12 Martin, 347; see *Daquin v. Coirow*, 6 Martin, N. S., 679. A sale of chattels by the probate court must be evidenced by a private signature or an authentic act, and the latter need not be signed.

(f) *National Fire Ins. Co. v. Loomis*, 11 Paige, 431 (*dictum*).

(g) *Hegeman v. Johnson*, 35 Barb. 203.

(h) *State (Ex rel. Crampton) v. Commissioners*, 14 Wis. 347, the court saying, "the counsel for the respondents seem to think that the relation does not show a valid sale, because it does

gous case in South Carolina.⁽ⁱ⁾ Where, therefore, the master, or other officer acts as auctioneer, and makes the memorandum, the latter is good as that of an auctioneer,^(j) and see *infra*, § 314, § 319. While there is much apparent, and perhaps some real conflict of decision as shown by the authorities just considered, the following propositions may reconcile most of the divergencies: I. A decree of confirmation of a judicial sale is a sufficient evidence of the contract, although there may have been no writing signed under the Statute of Frauds. II. While such a decree is the rule in most cases, it is not made because required by the Statute of Frauds. III. Nor is it essential, because if no decree is the practice, but the officer

not show that the commissioners made out a statement of the sale and signed the same, and caused it to be recorded, and it is insisted that this was essential within the decision in *Krebs v. Dodge*, 9 Wis. 1. But this is a misapprehension of the decision in that case. There mortgaged premises had been sold and bid in by the commissioner in behalf of the state, and it was held that the commissioner should make out a proper statement of the sale, sign and record the same, in conformity to the statute, for the reason that the law required such statement, and it was the only record evidence of the title of the lands in the state;" see, also, *Gough v. Dorsey*, 27 Wis. 127.

(i) *Jenkins v. Hogg*, 2 Const. (So. Car.) 834, where the court said: The second objection of the defendant is, that he did not sign the entry of purchase in the commissioner's sale-book, and that even the commissioner himself did not make the entry of the sale in his book for some hours after.

The first of this objection is unsanctioned by the practice of this country, at least in sales made by the authority of the courts. The officer is considered as the agent of both parties, as well as of the court, and the bidder is bound

by the entry which the officer makes. Mr. Sugden, in his excellent Treatise on the Law of Vendors, states, on the authority of Lord Chancellor Hardwicke (1 Ves., Sen., 218, 221), that a sale before the master is not within the Statute of Frauds, and the sale will be enforced even against the representatives of the purchaser, though he did not subscribe, the judgment of the court taking it out of the statute; Sugden's Law of Vendors, 36, 41.

The second part of this objection is, I think, equally unfounded. The commissioner testified that he immediately made an entry in pencil of the sale, on the advertisement of the property, which he held in his hand, and put down Mr. Hogg as the purchaser, and he made an entry in the sales book in his office in a few hours after the sale, and after Mr. Hogg had recognized the bidding made by his son on his behalf. This is sufficient, in my opinion, and does away the objection. The reason for requiring entries to be made promptly is to prevent mistakes and depending on mere recollections. The entries here were made in due time to guard against mistakes.

(j) *Jenkins v. Hogg*, *supra*.

selling is authorized to make his report or memorandum a part of the record, this latter is perhaps equivalent to the writing required by the Statute of Frauds.^(k) And if the more extreme of the above cases are followed, the entry upon the record is not essential; and IV. Where a master, etc., holds an auction, the writing then made will be valid under the Statute of Frauds if sufficient under an ordinary auction. Chancellor Kent^(l) was disposed to take the execution of the officer's deed as the true consummation and evidence of a public or judicial sale, but, as has been seen, the almost unvarying tendency of later decisions is to look to confirmation by the court as the completion of the officer's act, if the latter alone is not sufficient.

§ 308. That the requirements of the Statute of Frauds are those to which the primary consideration should be given, and that any exception in favor of transfers by or to public or quasi-public persons, should be affirmatively made out, is illustrated by *Hetfield v.*

Further
considera-
tion as to
judicial
sales.

Central R. R.; this was^(m) a case where a railroad charter authorized the taking possession of land with the owner's consent, and also directed that damage should be assessed by commissioners, and that such finding, describing the particular land, should be put in writing and recorded. And it was held, that upon failure of the railroad to carry out the latter clause, and upon their relying on the owner's consent, they must prove this consent as before the charter, *i. e.*, by writing, and that the chartering act was not intended to affect the Statute of Frauds; a parol assent under such circumstances was a revocable license. Where, however, an agreement similar to this, though not signed, was put upon the record, the Statute of Frauds was held not to apply; record evidence was spoken of as being the highest kind of evidence.⁽ⁿ⁾ Where a master's sale of land is required to be con-

(k) See the cases just cited and *Huston v. Cincinnati R. R.*, *infra*, where, however, the entry seems to have been made by the judge in the presence of the parties and of the sheriff and his jurors.

(l) *Simonds v. Catlin*, 2 Caines, 61.

(m) 5 Dutch., 575, reversing *Central R. R. v. Hetfield*, *ibid.* 206.

(n) *Huston v. Cincinnati R. R.*, 21 Ohio St. 246 (*semble* that the court itself made the entry).

summated by a deed, none of the questions which have just been considered can arise, so far at least as the legal title is concerned. In New York such a deed has been required ;(*o*) so in a sale by a referee under a judgment ;(*p*) so in a sale by the surveyor-general.(*q*) Where loan-officers sell public land no title passes till a deed is made, but from the making of the deed the title relates back to the time of the sale.(*r*)

§ 309. Sheriff's sales are within the Statute of Frauds.(*s*) This is the law in Louisiana also.(*t*) So a sheriff's sale in partition.(*u*) Sheriff's sale is not a judicial sale,(*v*) for he is obliged to sell, and does not invoke the judgment of any court.(*w*) In Mississippi the court did not decide the point made before them as to whether a sheriff's sale is within the Statute of Frauds ;(*x*) and in Massachusetts the query was made whether a sheriff's sale of an equity is within the Statute.(*y*) As has been said, an early case in Upper Canada suggests that execution-sales are not within the

(*o*) *Simonds v. Catlin*, 2 Caines, 61.

(*p*) *Willets v. Van Alst*, 26 How. Pr. 341, citing *Simonds v. Catlin*, and *Jackson v. Catlin*.

(*q*) *Simonds v. Catlin*, 2 Caines, 61.

(*r*) *Jackson v. Bull*, 2 Caines, 301.

(*s*) *Currie v. Mann*, 6 Ala. 532 (citing *Robinson v. Garth*, id. 204) ; *White v. Crew*, 16 Ga. 421 ; *Ennis v. Waller*, 3 Blackf. 476 ; *Hunt v. Gregg*, 8 Blackf. 109 ; *Chapman v. Harwood*, 8 Blackf. 83 ; *Had den v. Johnson*, 7 Ind. 396 ; *Ruckle et al. v. Barbour*, 48 Ind. 280 ; *Jones v. Kokomo*, 77 Ind. 343 ; *Linn Boyd Co. v. Terrill*, 13 Bush, 464 ; *Fenwick v. Floyd*, 1 Harr. & Gill, 172 ; *Hanson v. Barnes*, 3 Gill & Johns. 359 ; *Barney v. Patterson*, 6 Harr. & J. 204 ; *Remington v. Linthicum*, 14 Peters, 84 (passing on Maryland law) ; *Evans v. Wilder*, 7 Mo. 361 ; 5 Mo., 319 ; *Evans v. Ashley*, 8 Mo. 181 ; *Alexander v. Merry*, 9 Mo. 514 ; *Hartt v. Rector*, 13 Mo. 505 ; *Wiley v. Robert*, 27 Mo. 390 ; *Simons v. Catlin*, 2 Caines, 61 ; *Jackson d.*

Gratz v. Catlin, 2 Johns. 259 ; *Catlin v. Jackson*, 8 Johns. 531 ; *Christie v. Simpson*, 1 Rich., O. S. 408 ; *Elfe, v. Gadsden*, 2 Rich. 373 ; *Dawson v. Miller*, 20 Tex. 173 ; *Mingaye v. Corbett*, 14 U. C. C. P. 563 ; see *Rorer on Jud. Sales*, 2d ed., § 606 ; *Freem. on Executions*, § 299 ; *Crock. on Sher.*, §§ 504, 492 *et seq.*, § 557 *et seq.* ; *Gwynne on Sher.*, §§ 381, 354 (2d ed.).

(*t*) *Ayles v. Hawley*, 9 La. Ann. 363, which held that the sale of a chattel by a syndie through an auctioneer, in furtherance of judicial proceedings to settle an insolvent estate, must be in writing ; and that parol testimony of auctioneer was insufficient ; see *S. C.*, id. p. 362, to the effect that the chattel sold was a judgment.

(*u*) *Wiley v. Robert*, 27 Mo. 388.

(*v*) *Simonds v. Catlin*, 2 Caines, 61.

(*w*) *Brent v. Green*, 6 Leigh, 23.

(*x*) *Hand v. Grant*, 5 Sm. & M. 508.

(*y*) *Pomeroy v. Winship*, 12 Mass. 523.

Statute of Frauds, because there is no contract involved.(z) By statute in Georgia the Statute of Frauds does not apply to sheriff's sale.(a) In North Carolina sheriff's sales, being apparently regarded as judicial sales, were held not to be within the Statute of Frauds, the court arguing that a memorandum could not be required by the party to be charged when there could be no such person; and the argument from inconvenience was also strongly pressed.(b) So also, perhaps, in Tennessee.(c)

§ 310. Sheriff's sales being then within the Statute, must be evidenced by a writing, signed by the sheriff or his agent.(d) So that where a sheriff, selling a lease under an execution signed no memorandum, and the judgment creditor and debtor came to an agreement, the sheriff's vendee could not recover, owing to the want of a writing under the Statute of Frauds.(e) The sheriff, as being the officer authorized by law to make the sale, can execute the memorandum and can bind the parties without

Memorandum of a sheriff's sale and who shall make it.

(z) *Haydon v. Crawford*, 3 U. C. K. B., O. S. 588.

(a) Act Dec. 27, 1831; *Sanderlin v. Trustees of R. C. Church*, R. M. Charlton Rep. 552.

(b) *Tate v. Greenlee*, 4 Dev. 154; see *Hunt v. Gregg*, 8 Blackf. 108, where it is said that the sheriff is the agent of the purchaser, but not of the creditor, for the title to the land is not in him, nor of the execution debtor, for he has no power over the sale; see, also, *Williamson v. Logan*, 1 B. Mon. 241, where the sheriff's authority is said to come from the law, and not from the execution defendant. In *Christie v. Simpson*, 1 Rich., O. S. 408, it was suggested that sheriff's sale might not be within the Statute of Frauds; and cited *Tate v. Greenlee*, and *Anderson v. Chick*, *Bailey's Eq.* 118.

Where a sheriff does an act beyond his legal powers, as by making a deed conveying more rights than the person

directing him to convey had in the lands, his authority, which is from his principal and not from the law, must be evidenced in the same way as that of any one else, in this case by a deed or writing; *Stoney v. Shultz*, 1 Hill Ch. 499.

(c) *Nichol v. Ridley*, 5 Yerg. 65, which probably, however, only meant that the sheriff's return satisfied the Statute; see, also, *Emley v. Drum*, 36 Pa. St. 125.

(d) *Simonds v. Catlin*, 2 Caines, 61; *Fenwick v. Floyd*, 1 Har. & Gill, 172; *Hanson v. Barnes*, 3 Gill & Johns. 359; *Duvall v. Waters*, 1 Bland. Ch. 590; *Barney v. Patterson*, 6 Har. & J. 204; *Estep v. Weeme*, 6 G. & J. 306; *Nichol v. Ridley*, 5 Yerg. 63; *Remington v. Linthicum*, 14 Pet. 84; *Mingaye v. Corbett*, 14 U. C. C. P. 563.

(e) *Witham v. Smith*, 5 Grant (U. C.) Ch. 207.

their signing.(f) As has been said, the sheriff is not the agent of the execution creditor, nor of the execution debtor, but of the law in selling the land,(g) and of the purchaser who gives authority by his bid to make the memorandum; see § 315. A parol authority to make a contract of sale of land is good, but *secus* to the sheriff to levy on more land than is necessary to satisfy an execution, and to sell the same.(h) But the sheriff cannot make use of his own memorandum when he himself sues for breach of contract of sale.(i) But, on the other hand, the sheriff's return has been held good evidence even when he is suing on it himself.(j) Or that it is at least *primâ facie* proof, the case of a mere auctioneer being different.(k) The deputy sheriff, or clerk, can make the memorandum.(l) A memorandum made according to the custom of the office, by the deputy sheriff, is sufficient.(m) One deputy may make the sale and another the memorandum, each acting under the sheriff's direction.(n) So a sheriff's deed, executed by a deputy sheriff, though without special authority, was held to be valid.(o) The memorandum made by his sub-

(f) *Sanborn v. Chamberlin*, 101 Mass. 416; *Gordon v. Sims*, 2 McCord Ch. 164; *Hutton v. Williams*, 35 Ala. 514; *Hunt v. Gregg*, 8 Blackf. 111; *Emley v. Drum*, 36 Pa. St. 125; *Secrist v. Twitty*, 1 McM. 255; *Endicott v. Penny*, 14 Sm. & M. 157; *Bicknell v. Byrnes*, 23 How. Pr. 488, citing cases; *Lay v. Neville*, 25 Cal. 551.

(g) *Hunt v. Gregg*, 8 Blackf. 111; see *Tate v. Greenlee*, 4 Dev. 149; see *Williamson v. Logan*, 1 B. Mon. 241.

(h) *Isaacs v. Gearheart*, 12 B. Mon. 233.

(i) *Hunt v. Gregg*, 8 Blackf. 110, citing the analogous rule in auction sales, but admitting that under the Indiana statute there was no force in the objection; *Robinson v. Garth*, 6 Ala. 208, distinguishing *Bird v. Boulter* as a case where the clerk made the memorandum.

(j) *Nichol v. Ridley*, 5 Yerg. 65.

(k) *Hand v. Grant*, 5 Sm. & M. 508.

(l) *Wiley v. Robert*, 27 Mo. 390; *Christie v. Simpson*, 1 Rich. O. S. 408; *Brent v. Green*, 6 Leigh. 16, citing *Farebrother v. Simmons*, 5 B. & Ald. 333, holds that the sheriff cannot, and that the deputy sheriff can, make the memorandum, though the sheriff (?) may be responsible for the proceeds; *Evans v. Wilder*, 5 Mo. 319; 7 Mo. 361; *Emley v. Drum*, 36 Pa. St. 125; *Christie v. Simpson*, 1 Rich. O. S. 408, distinguishing *Entz v. Mills*, 1 McM. 453, as not applying to sheriff's sales; see *Wolfe v. Sharpe*, *supra*, saying that *Entz v. Mills* decides that a vendue master must himself make the memorandum of the sale; *Stewart v. Garvin*, 31 Mo. 36; see § 317.

(m) *Barclay v. Bates*, 2 Mo. App. 145.

(n) *Id.*

(o) *Jackson v. Davis*, 18 Johns. 10; *Evans v. Wilder*, 7 Mo. 361; 5 Mo. 319.

ordinate must, however, be in the sheriff's name,(p) and must not be signed by the deputy in his own name.(q) As to a difference in this respect in the case of ordinary auction sales, see *infra*.(r)

§ 311. The memorandum may be of an informal character.(s) Putting the purchaser's name and the price in the list of an insolvent's effects by the sheriff, who sells, is sufficient.(t) In South Carolina it has been held that a sheriff or vendue master must make the memorandum in his book, but that this is only necessary in order to bind the third party; to bind himself when not representing others any writing suffices;(u) see auction sales, § 314. The title under a sheriff's sale may be deduced from any of the official proceedings.(v) The sheriff who makes a sale of land under an order of sale in proceedings in partition is the agent both of the vendor and the vendee, to make the memorandum required by the Statute of Frauds. Memorandum, therefore, in the sheriff's book, giving the price, the buyer's name, the terms of sale, and a reference to the petition for partition, containing the description of the property, is sufficient, there being a reference in the sheriff's book connecting the papers in the proceedings with the memorandum; the sheriff in this matter can act by his deputy.(w) Where the memorandum made by the auctioneer refers to the *fi. fa.* the two together are sufficient to satisfy the Statute of Frauds.(x) The sheriff's return is a compliance with the Statute.(y) It will be assumed to be right till impeached;(z)

(p) *Evans v. Ashley*, 8 Mo. 177; *Simonds v. Catlin*, 2 Caines, 66.

(q) *Evans v. Ashley*, 8 Mo. 181; but see *contra* *Evans v. Wilder*, 5 Mo. 319.

(r) *Pinckney v. Hagadorn*, 1 Duer, 95.

(s) *Remington v. Linthicum*, 14 Peters, 84; *Lay v. Neville*, 25 Cal. 551; see *Ruckle v. Barbour*, 48 Ind. 280 (making the query whether an entry in the sheriff's private sales book is sufficient); see *Wiley v. Robert*, 27

Mo. 388. For memoranda of public sales held sufficient or not, see, also, the chapter on the Memorandum.

(t) *Brent v. Green*, 6 Leigh, 16.

(u) *Daniel v. Harley*, 3 Strobb. 233; see above.

(v) *Wright v. Orrell*, 19 Md. 155.

(w) *Stewart v. Garvin*, 31 Mo. 36; see *Secrist v. Twitty*, 1 McMul. 255.

(x) *Elfe v. Gadsden*, 2 Rich. 373.

(y) *Fenwick v. Floyd*, 1 Harr. & Gill, 172; *Hanson v. Barnes*, 3 Gill &

(z) *Jones v. Kokomo*, 77 Ind. 343.

and no other memorandum is necessary. (a) The sheriff's memorandum; indeed, should be official and not private. (b) The return should fully describe the contract of sale. (c)

§ 312. And this memorandum or return should be made at the time of the sale, at least in Indiana. (d) Following the same line of authority, it was held that the sheriff's memorandum must be made at time of sale, and that his testimony given years afterward that he made his return of sale "immediately" after the sale is not sufficient, as it does not appear how soon "immediately" meant. There being no deed or certificate of purchase made to the buyer, and no memorandum except the above return, the Statute of Frauds was held to apply. (e) In Canada it has also

When
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Johns. 359; *Barney v. Patterson*, 6 Harr. & J. 204; *Nichol v. Ridley*, 5 Yerg. 63; *Remington v. Linthicum*, 14 Peters, 84; *Duvall v. Waters*, 1 Bland Ch. 590; *Hunt v. Gregg*, 8 Blackf. 110; *Emley v. Drum*, 36 Pa. St. 125; *Sanborn v. Chamberlin*, 101 Mass. 416.

(a) *Hadden v. Johnson*, 7 Ind. 396.

(b) *Linn Boyd Co. v. Terrill*, 13 Bush, 464.

(c) *Duvall v. Waters*, 1 Bland Ch. 590; see *Robinson v. Garth*, 6 Ala. 208.

(d) *Chapman v. Harwood*, 8 Blackf. 83; *Adams v. McMillan*, 7 Porter, 80 (citing cases); *Hadden v. Johnson*, 7 Ind. 396. In another case in the same state the court said, our opinion is, that a sheriff's return, setting forth a sale of land made by him on execution to serve the purpose of a note in writing under the Statute of Frauds, must be made immediately upon striking off the property to the highest bidder; and that after that time the sheriff has no authority to bind the purchaser in any manner whatever. The alleged sale in this cause was made on the 27th of August, 1842. The return day of the execution was the 4th of December following. The return given in

evidence bears no date; and there was no proof when it was made or filed in the clerk's office. We cannot presume that it was made before the return day. More than three months, therefore, appear to have intervened between the time of sale and the return of the execution; *Hunt v. Gregg*, 8 Blackf. 110.

(e) *Gossard v. Ferguson*, 54 Ind. 523.

So it was said that "all the authorities agree in holding that the return of a sheriff upon an execution or order of sale, if made and signed at the time of the sale, and filed in the office from which it was issued within the lifetime of the writ, will be sufficient to take the sale out of the Statute of Frauds. We think it may reasonably be inferred, from the power to re-expose and sell at a subsequent day, that the sheriff may give reasonable time to the purchaser for the payment of amount bid; but in such case he should, at the time of the sale, make, upon the execution or decretal order, a memorandum of the sale, sufficient to satisfy the Statute of Frauds."

The facts of the case were that the sheriff, a long time after the sale, gave

been held that the authority of the sheriff or clerk to make the memorandum ceases with the sale, because it is the presence of the parties which gives the authority; see § 317.(f) In a recent Missouri case the court said: "The memorandum in this case was not, as counsel asserts, invalid under the Statute, if made by a deputy who was not present at, or who had nothing to do with, the sale. It was not necessary that the memorandum should be made on the fall of the hammer. It is true that a remark of that kind escapes from Judge Story in *Smith v. Arnold*, 5 Mason, 419, speaking of an ordinary auction sale. But this is a mere *dictum*, made in illustration of an entirely different question. It is not approved; and, except for that remark, there is no intimation from any respectable source that the memorandum must be absolutely contemporaneous. Even in the case of an ordinary auctioneer it has never been decided that the memorandum must be made at the instant. In the case of the sheriff there is no good reason to doubt that a memorandum made by a deputy, according to the custom of the office, on the day of, and shortly after, the sale, if otherwise sufficient, will satisfy the Statute. The sheriff sells as sheriff, not merely as an auctioneer, and his character does not die with the sale, as may be the case with a private individual crying off property at the request of another." (g) But in Maryland it has been held, *semble*, that the sheriff's memorandum may be made at any time before suit brought. (h) And so also in Massachusetts, and *semble* South Carolina. (i) The officer's signature can be subsequently added. (j)

he vendee, at his sale, a certificate of purchase; the owner of the land had in the meanwhile tendered the amount of the mortgage on the land under which the sale had been made. Under the Indiana Statute it was the sheriff's duty to resell the land, or to make proper memorandum, and hold the vendee under the Statute; and he cannot give a certificate of purchase to the vendee who has not paid, as was the case here; *Ruckle v. Barbour*, 48 Ind. 280, citing numerous cases.

(f) *Flintoft v. Elmore*, 18 U. C. P., 281 (citing *Mews v. Carr*, 1 H. & N. 484).

(g) *Barclay v. Bates*, 2 Mo. App. 145, citing *Miles v. Davis*, 19 Mo. 412, and distinguishing *White v. Watkins*, *Buckmaster v. Harrop*.

(h) *Remington v. Linthicum*, 14 Peters, 92; see *Hanson v. Barnes*, 3 G. & J. 368.

(i) *Saunborn v. Chamberlin*, 101 Mass. 416; *Christie v. Simpson*, 1 Rich., O. S. 408.

(j) *Wilton Man. Co. v. Butler*, 34

§ 313. The certificate given by the sheriff to the purchaser is sufficient;(l) and such certificate is sufficient by itself.(m) A certificate of the sale of land by the sheriff for taxes is sufficient, though signed by him as collector.(n) Such a certificate is sufficient, yet under a Wisconsin statute the vendee cannot sue for the land till he gets a deed.(o) While the sheriff's memorandum is sufficient to satisfy the Statute of Frauds, a deed is necessary in order to pass the legal title.(p) There must also be payment of the purchase-money.(q) The law is well settled, that a sale by a sheriff of real estate, upon an execution or an order of sale issued upon a decree of foreclosure, is within the Statute of Frauds, and cannot be enforced by either party unless the sheriff, at the time of the sale, make a memorandum of such sale and sign the same; and it is equally well settled that if land be struck off at a sheriff's sale to a bidder, but the land be not conveyed by the sheriff, nor the purchase-money paid, the execution debtor's title to the land is not divested, nor is the judgment or decree satisfied by the sale.(r) The memorandum or return of the sheriff will not act as a deed to pass the title.(s) The seizure of lands under a *fi. fa.* does not divest the debtor's title;(t) and, therefore, where the sheriff has levied by *fi. fa.* upon a lease he must execute a written assignment of it to satisfy the Statute of Frauds.(u) If the vendee accepts a deed, the necessity of a memorandum under the Statute of Frauds is dispensed with.(v) Where a sheriff's

Sheriff's
certificate
and his
deed.

Me. 442; see generally, as to when such a memorandum must be made, *Jenkins v. Hogg*, 2 Const. Rep. (S. Car.) 837.

(l) *Evans v. Ashley*, 8 Mo. 177; *Esmay v. Gorton*, 18 Ill. 483.

(m) *Armstrong v. Vroman*, 11 Minn. 222.

(n) *Sheldon v. Coates*, 10 Ohio, 279.

(o) *Dean v. Pyncheon*, 3 Chand. 19.

(p) *Dean v. Pyncheon*, 3 Chand. 19; *Simonds v. Catlin*, 2 Caines, 61; *Catlin v. Jackson*, 8 Johns. 520; *Hart v. Rector*, 13 Mo. 505.

(q) *Catlin v. Jackson*, 8 Johns. 520; *Ruckle v. Barbour*, 48 Ind. 280; *Robinson v. Garth*, 6 Ala. 208.

(r) *Ruckle v. Barbour*, *supra*, citing *Curran v. Curran*, 40 Ind. 478, and other cases.

(s) *Esmay v. Gorton*, 18 Ill. 483; *Durnford v. Degruys*, 8 Martin, 222.

(t) *Catlin v. Jackson*, 8 Johns. 550.

(u) *Doe v. Jones*, 9 M. & W. 376; 6 Jur., 302; 1 Dowl., N. S., 352; 12 L. J. Exch., 265.

(v) *Hadden v. Johnson*, 7 Ind. 396; and so when the deed is made to one who has even by parol received an assignment of the bid, his title will be good; *Testerman v. Poe*, 2 Dev. & Bat. 105 (citing *Shamburger v. Kennedy*, 1 Dev. 1).

vendee transferred his interest, and had the name of his assignee inserted in the deed instead of his own, the Statute is satisfied.(w) In Maryland the general rule now under consideration appears to have been denied, and a deed confirmatory of the sheriff's memorandum held not to be necessary to pass even the legal estate.(x) It has been said that the title may be deduced from any of the official proceedings of a sheriff's sale;(y) and, though there be a deed, the sheriff's return appears to be also necessary.(z) While the title will not pass till the deed is made, *vide supra*, the deed relates back to the time of the contract.(a) And generally, where, under a sale invalid under the Statute of Frauds, a deed is regularly given, an intermediate sale by the vendee binds.(b) The relation back of the sheriff's deed will not be allowed to operate to the disadvantage of third persons.(c) That sheriff's deed may be executed by the deputy sheriff, see *supra*.(d)

§ 314. Auction sales are within the Statute of Frauds.(e) The earliest case on the subject, *Simon v. Metivier* or *Motivos*,(f)

(w) *Endicott v. Penny*, 14 Sm. & M. 157.

(x) *Estep v. Weems*, 6 G. & J. 306 (citing cases); *Remington v. Linthicum*, 14 Peters, 84; *Fenwick v. Floyd*, 1 H. & G. 174. The same rule applied to devisees directed to sell for the payment of debts; *Keys v. Goldsborough*, 2 Harr. & J. 371.

(y) *Wright v. Orrell*, 19 Md. 155.

(z) *Barney v. Patterson*, 6 H. & J. 205; *Remington v. Linthicum*, *supra*.

(a) *Jackson v. Catlin*, 8 Johns. 550; *Alexander v. Merry*, 9 Mo. 527.

(b) *Jackson v. Bull*, 2 Caines Cas. 301.

(c) *Alexander v. Merry*, 9 Mo. 527.

(d) *Jackson v. Davis*, 18 Johns. 10.

(e) *Buckmaster v. Harrop*, 7 Ves. 344; *Mason v. Armitage*, 13 Ves. 36; *Higginson v. Clowes*, 15 Ves. 521; *Kenworthy v. Schofield*, 2 B. & C. 945; *Carmack v. Masterson*, 3 Stew. & Port. 413; *Knox v. King*, 36 Ala. 367; *Sanderlin v. Trustees of R. C. Church*, R.

L. Charlton Rep. 552; *White v. Crew*, 16 Ga. 421; *Burke v. Haley*, 2 Gilm. 614; *Lake v. Campbell*, 18 Ill. 109; *Ennis v. Waller*, 3 Blackf. 476; *Norris v. Blair*, 39 Ind. 94; see *Leavitt v. Watson*, 37 Ia. 93; *Martin v. McFadin*, 4 Littell, 242; *Pike v. Balch*, 38 Me. 302; *O'Donnell v. Leeman*, 43 Me. 160; *Horton v. McCarty*, 53 Me. 394; *Spencer v. Pearce*, 10 G. & J. 299; *Davis v. Rowell*, 2 Pick. 64; *Morton v. Dean*, 13 Metc. 387; *Jelks v. Barrett*, 52 Miss. 322; *Johnson v. Buck*, 35 N. J. L. 340; *Davis v. Robertson*, 1 Const. Rep. 71; *Cochran v. Roundtree*, 3 Strob. 219; *Id.*, 233; *Brent v. Green*, 6 Leigh, 23; *Smith v. Jones*, 7 Leigh, 170; see 16 Amer. Jur., 295; see *Ross on Vend.*, p. 25; 10 Leg. Obs., 240; 1 Cent. L. J., 380; *Irish Law Times* (July 4, 1874); 22 Amer. L. Reg., N. S. 9 and 12; 8 South. L. Rev., N. S., 594; *Amer. L. Rev.*, Feb., 1883; as to oral biddings, see 1 Coop. Eq. Dig. (Can.), 84.

(f) *Wm. Black*, 600; 3 Burr., 1921.

had said that the Statute did not apply to such sales; and it was not till after the case had been distinguished and explained in a variety of modes, that the dictum therein was finally overruled.^(g) Thus, in one decision, while Lord Ellenborough^(h) expressly denied the dictum in *Simon v. Metivier*, the rest of the court declined passing upon the point. Lord Ellenborough thought that it would be dangerous and uncertain to go outside of the Statute of Frauds to ascertain what degree of publicity in a sale would be an adequate safeguard against frauds and perjury. The plea for making this exception has generally been that auction sales are so public that there is no need of a writing,⁽ⁱ⁾ but this has, on the other hand, been denied to be a fact, and the litigated cases as to public sales are instanced.^(j) It was held, in some of the earlier cases, that *Simon v. Motivos* applied only to goods and not to land.^(k) But later authority has taken away all value from the distinction by regarding both classes of sales as within the Statute.^(l) In Louisiana a sale at auction is complete by the adjudication, but the law requires an act of sale or other written evidence of the contract; the purchaser, too, has a right to a conveyance.^(m)

(g) There is also dictum of Le Blanc, J., at *nisi prius* in *Bradshaw v. Fletcher*, cited in *Fell on Guaranty* (Amer. ed.), p. 375, following the dictum in *Simon v. Motivos*; see *Fell's* remarks thereon.

(h) *Hinde v. Whitehouse*, 7 East, 568.

(i) See *Gill v. Bicknell*, 2 Cushing, 358, where it is said that auction sales being open and notorious, there is less danger of perjury as to the contract of sale.

(j) *Blagden v. Bradbear*, 12 Ves. Jr. 471 (distinguishing *Simon v. Metivier* as a case where there was a sufficient memorandum).

(k) *Walker v. Constable*, 2 Esp. 661; 1 B. & P. 306; *Stansfield v. Johnson*, 1 Esp. 102 (which, while admitting that under *Simon v. Motivos* the auctioneer may make the memorandum in a sale of goods, deny this power in the

case of lands, they do not notice the dictum that auction sales of goods are not within the Statute.

(l) *Mason v. Armitage*, 13 Ves. 36 (saying that the 4th and 17th sections are alike on this point); *Buckmaster v. Harrop*, *supra*, criticizing *Walker v. Constable*, *supra*, and *Stansfield v. Johnson*, *supra*; *Sanderlin v. Trustees of R. C. Church*, R. M. Charlton, 552 (citing *Buckmaster v. Harrop*, *supra*, and *Coles v. Trecothick*, and other cases, and denying the dictum in *Simon v. Motivos*, and doubting whether it decided more than that the auctioneer was the agent of both parties to make the memorandum); *Hunt v. Gregg*, 8 Blackf. 108 (citing cases); and see *infra*.

(m) *Canal Bank v. Copeland*, 6 La. 550.

§ 315. The auctioneer is agent for both parties to make a memorandum binding them to the contract.⁽ⁿ⁾ It has been said that this is so if the entries are legally made.^(o) The auctioneer must make a memorandum, and till he has done so no one is bound; and though the hammer has fallen he may reopen the sale and take a higher bid.^(p) The auctioneer is the vendor's agent till the knocking down of the hammer, which makes him the vendee's agent.^(q) It has been said that a buyer at an auction sale may revoke the auctioneer's authority after the land has been knocked down to him, if before his name has been signed to the contract by the auctioneer.^(r) The vendor employs the auctioneer to make the memorandum, and the buyer by bidding sanctions the authority of the officer to

Auctioneer
agent of
both parties
to make
memoran-
dum.

(n) *Simon v. Metivier*, Wm. Black. 600; *White v. Proctor*, 4 Taunt. 212; *Emmerson v. Heelis*, 2 Taunton, 38; *Buckmaster v. Harrop*, 7 Ves. 341; *Warlow v. Harrison*, 1 E. & E. 306; *Glen-gal (Earl of) v. Barnard*, 1 Keen, 788; *Kemeys v. Proctor*, 1 Jac. & W. 350; 3 V. & B. 57; *Shelton v. Livius*, 2 Cr. & J. 414; 2 Tyrw. 432; *Wood v. Midgley*, 2 Sm. & G. 115; *Arden v. Brown*, 4 Cranch, C. C. 121; *Hutton v. Williams*, 35 Ala. 514; see Ala. Code, §§ 1798-2122 (1876); see Cal. C. C., § 1798 (1873); *Doty v. Wilder*, 15 Ill. 407; *Lake v. Campbell*, 18 Ill. 109; *Yourt v. Hopkins*, 24 Ill. 326; *Ennis v. Waller*, 3 Blackf. 476; *Hart v. Woods*, 7 id. 568; *Hunt v. Gregg*, 8 id. 109; *Gill v. Hewett*, 7 Bush, 10; *Thomas v. Trustees of Harrodsburg*, 3 Marsh. 299; *Singstack's Ex. v. Harding*, 4 H. & J. 186; *Ijams v. Hoffman*, 1 Md. 423; *Gill v. Bicknell*, 2 Cush. 358; *Morton v. Dean*, 13 Mete. 387; *Cleaves v. Foss*, 4 Greenl. 1; *Inhabitants of Alna v. Plummer*, id. 263; *Pike v. Balch*, 38 Me. 302; *O'Donnell v. Leeman*, 43 Me. 160; *Jelks v. Barrett*, 52 Miss. 322; *Johnson v. Buck*, 35 N. J. L. 340; *Mc-*

Comb v. Wright, 4 Johns. Ch. 659; *Cozine v. Graham*, 2 Paige Ch. 179; *Miller v. Pelletier*, 4 Edw. Ch. 104; *Hegeman v. Johnson*, 35 Barb. 203; *Price v. Durin*, 56 Barb. 645; *Earl v. Campbell*, 14 How. Pr. 333; *Bleecker v. Franklin*, 2 E. D. Smith, 94; *Tallman v. Franklin*, 14 N. Y. 584; *Gwathney v. Cason*, 74 N. Car. 7; *Davis v. Robertson*, 1 Constitut. Rep., N. S. (Mill.) 71; *Anderson v. Chick*, Bailey's Eq. 118; *Wolfe v. Sharp*, 10 Rich. (So. Car.) 63; *Brook v. Jones*, 8 Tex. 79; *Dawson v. Miller*, 20 Tex. 173; *Smith v. Jones*, 7 Leigh, 170; *Bamber v. Savage*, 8 Nor. W. Rep. 610; 52 Wis. 113 (citing cases).

(o) *Jacheus v. Nicolson*, 28 Alb. L. J. 17 (S. C. Ga.)

(p) *Pike v. Balch*, 38 Me. 302.

(q) *Payne v. Cave*, 3 T. R. 149; *Simon v. Metivier* or *Motivos*, Wm. Black. 690; 3 Burr. 1921; *Warlow v. Harrison*, E. & E.; *Gwathney v. Cason*, 74 N. Car. 7; *Jelks v. Barrett*, 52 Miss. 322.

(r) *Eckroyd v. Davis*, 3 Vict. Law Rep. 228, as cited in 30 Moak, 670.

do so.(s) The auctioneer must be a public one, and not a mere agent of the vendor.(t) In an English chancery case, before Stuart, V. C., a memorandum made at a private sale, carried through by an auctioneer entrusted with the public sale of it, was held sufficient to bind the buyer, but on appeal this was reversed, and as the defendant had refused to sign, specific performance was refused.(u) An auctioneer is not *ex vi termini* agent for both parties, but the extent of his authority may be modified by the circumstances of the particular case; therefore, where a buyer bid under a previous agreement as to a particular mode of payment, she was not bound to the conditions of the sale merely by the auctioneer's putting down her name.(v) The earlier authorities which raised the question, whether or not an auction sale is within the Statute or not, found a further difficulty in the point that there was a difference between a sale of goods and one of land, as regards the auctioneer's power to make the memorandum.(w) In *Coles v.*

(s) *Bird v. Boulter*, 1 N. & M. 316; 4 B. & Adol. 446; *Emmerson v. Heelis*, 2 Taunt. 38; *Walker v. Herring*, 21 Gratt. 683; *Gill v. Bicknell*, 2 Cushing, 258.

(t) *Anderson v. Chick*, Bailey's Eq. 118.

Bamber v. Savage, 52 Wis. 113. "In this case, as we have said, the auctioneer made no memorandum. The person who did make it was Mr. Connolly, who was acting exclusively as the agent of the plaintiff in the transaction. He had no authority to act for the defendant, and did not assume to act for her in making the contract. And it seems to us it would be an extraordinary position to hold that he, acting as agent of the vendor after the sale was made by the auctioneer, could draw up a memorandum of the contract, sign it on behalf of his principal, and bind the vendee, who never saw it, nor assented to its terms.

It needs no argument to show the unsoundness of such a position. There are cases which hold that where a con-

tract for the sale of land has been signed by the vendor, and delivered to and accepted by the vendee, the latter is bound by its terms, though he never executed it; *Vilas v. Dickinson*, 13 Wis. 488; *Lowber v. Connit*, 36 Wis. 177; *Hutchinson v. C. & N. W. R'y*, 37 Wis. 582. But the doctrine of those cases does not aid the plaintiffs, because here there was no acceptance of, or even assent to, the terms of the memorandum on the part of the defendant."

(u) *Wood v. Midgley*, 2 Sm. & G. 115; 5 De G. M. & G., 44.

(v) *Bartlett v. Purnell*, 4 A. & Ell. 793; and see *infra*.

(w) See *Walker v. Constable*, 2 Esp. 661; 1 B. & P., 306, and *Stansfield v. Johnson*, 1 Esp. 102; holding that in the case of a sale of land, the auctioneer could not make the memorandum, and these authorities were on principle approved by the Lord Chancellor and the Master of the Rolls, in *Kemeys v. Proctor*, 1 J. & W. 350; 3 V. & B. 57; which, how-

Trecothick, however, Lord Eldon denied the distinction, and said that the auctioneer could make a memorandum of the sale of land as well as that of the sale of goods;(x) and the authority of the auctioneer, to make the memorandum in the case of land, is now settled.(y) The right of the auctioneer to make the memorandum has been regarded with some doubt, even in the later authorities, but there is not enough dissent, however, to shake the rule.(z) In Kentucky it was formerly said, that the memorandum by the auctioneer, in his book, would not bind unless signed by the defendant, or by some one authorized by him.(a) The change in the law of New York, made by the revised statutes, has been described as follows: "Before the revised statutes it was settled that the auctioneer, in these public sales, is the agent of both the buyer and the seller, and that his entry of the name of the purchaser in his sales book, immediately on striking off the property to him, was a sufficient signing of the contract to bind the purchaser. The revised statutes require the note, or memorandum, of the contract to be subscribed by the party making the sale, or his authorized agent (R. S., Pt. II. c. 7, t. 2, § 4.). Here

ever, followed on authority the common law case of *Emmerson v. Heelis*, overruling the above decisions. In *Walker v. Constable* there does not appear to have been any memorandum at all made.

(x) 9 Ves. Jr. 242, denying ruling of Eyre, C. J., in *Walker v. Constable*; see *Buckmaster v. Harrop*, and *Stansfield v. Johnson*, *supra*.

(y) *Kenworthy v. Schofield*, 2 B. & C. 945, remarking, that in this connection the 4th and 17th sections of 29 Car. II. c. 3, are the same; *Kemeys v. Proctor*, 1 Jac. & W. 350; 3 V. & B., 57; *Gordon v. Sims*, 2 McCord, Ch. 164, citing English cases; *Doty v. Wilder*, 15 Ill. 410, citing a number of English and American decisions, q. v.; *Cleaves v. Foss*, 4 Me. 9; see *Anderson v. Chick*, *Bailey's Eq.* 118, considering the cases elaborately, but not deciding the point;

but see S. C. on appeal, *id.* 125, following the later English rule; *Singstack v. Harding*, 4 Harr. & Johns. 192; see *Sanderlin v. Trustees of R. C. Church*, R. M. Charlton Rep. 552, citing the English cases, but not deciding whether the auctioneer can make the memorandum.

(z) In *Sanderlin v. Trustees*, *supra*, the court, as has been said, would not decide the point. In *Cleaves v. Foss*, 4 Me. 9, *supra*, though admitted to be settled, the rule was doubted on principle; so in *Anderson v. Chick*, *Bailey's Eq.* 118, *supra*; so in *Smith v. Arnold*, 5 Mason C. C. 414.

(a) *Martin v. McFadin*, 4 Littell, 242; but see *Gill v. Hewett*, 7 Bush, 10, distinguishing *Thomas v. Trustees of Harrodsburg*, and denying *dictum* in *Martin v. McFadin*.

the entry is subscribed by the auctioneer with his own name, without any reference to his character as agent." This was a sale of land, and the auctioneer may be made the agent spoken of in the revised statutes.^(b) But, in the case of a sale of goods, the old rule continues, and the auctioneer can make the memorandum.^(c)

§ 316. The auctioneer may be authorized by parol.^(d) The effect of bidding is, as has been seen, to make the auctioneer an agent to bind the buyer by a memorandum properly drawn, *vide supra*. This implied Parol authority to auctioneer. authority to an agent to make the memorandum is peculiar to auction sales.^(e) Parol authority given by the defendant in an execution to the sheriff to sell in gross, instead of separately, is good; it is a mere waiver of an irregularity, and the sheriff's authority comes from the law and not from the execution defendant; see above as to judicial sales.^(f) But authority to sell more than is necessary to satisfy an execution cannot be orally given.^(g) In Louisiana, the vendor's authority to the auctioneer must be in writing.^(h) A title to real estate in Louisiana does not pass by the adjudication of an auctioneer unless the latter was authorized in writing.⁽ⁱ⁾

§ 317. The auctioneer's memorandum must be made at the time, for his authority to do so ceases with the sale.^(j) This

(b) *Pinckney v. Hagadorn*, 1 Duer, 95, citing *McComb v. Wright*, 4 Johns. Ch. 359; *Emmerson v. Heelis*, 2 Taunt. 38; *Kemeys v. Proctor*, 3 Ves. & B. 57; *First Baptist Church v. Bigelow*, 16 Wend. 28; *Champlin v. Parish*, 11 Paige, 408.

(c) *Champlin v. Parish*, 1 Paige Ch. 408; *Coles v. Bowne*, 10 Paige Ch. 535.

(d) *Lake v. Campbell*, 18 Illinois, 109; *Church (Trustees of Episcopal) v. Wiley*, *Riley's Chancery Cases*, 160; *Emmerson v. Heelis*, 2 Taunt. 38; *Sewall v. Fitch*, 8 Cowen, 218; *Alna v. Plummer*, 4 Maine, 258; *Yourt v. Hopkins*, 24 Ill. 326; *Doty v. Wilder*, 15 Ill. 407.

(e) *Glengal v. Barnard*, 1 Keen, 789.

(f) *Williamson v. Logan*, 1 B. Mon. 241.

(g) *Isaacs v. Gearheart*, 12 B. Mon. 233.

(h) *Macarty v. New Orleans Canal Co.*, 8 Robin. 104; *Bonner v. Baker*, 8 La. Ann. 284 (citing cases); see *Pew v. Livaudais*, 3 La. 460.

(i) *Cronan v. Succession of McDonogh*, 12 La. Ann. 269.

(j) *Mews v. Carr*, 1 H. & N. 488; *Gwathney v. Cason*, 74 N. Car. 7; *Smith v. Arnold*, 5 Mason's C. C. 414; *Horton v. McCarty*, 53 Me. 396; *Walker v. Herring*, 21 Gratt. 680 (citing cases); *Fessenden v. Mussey*, 11 Cush. 127; *Howe v. Dewing*, 2 Gray, 477 (*dictum*);

was said by Judge Story to be a judicial addition to the requirements of the Statute.^(k) The memorandum must be made in the defendant's presence says one authority;^(l) "immediately on the fall of the hammer," says another.^(m) A month later is too late.⁽ⁿ⁾ As to the rule in sheriff's sales see above. It was said in one decision that it would be safer to call the auctioneer as a witness than to let him make the memorandum long after the sale.^(o) The exact duration of the period during which the auctioneer's authority continues is not altogether easy to determine; it has been held that if he puts the price and the purchaser's name on a loose paper, and returning to his office enters it in a book, it is enough.^(p) A delay of a few hours may be fatal.^(q) An alteration in one of the conditions of sale, made at the time in lead pencil and afterwards written over with ink, is sufficient.^(r) That the memorandum may be made the same day, though not at the precise time of sale, see above.^(s) In South Carolina it was held that the memorandum need not be at the time of the sale.^(t) Under 2 R. S. 136, § 4, of New York, the memorandum must be made by the auctioneer at the very instant of the sale, the statute on this point being strictly construed.^(u) Where an auctioneer had at the time and place of the sale made a memorandum, and immediately after the sale had copied the note into a sales book in his own office in a different building in the same street, the statute was not complied with.^(v) As to how far an entry in a book by the auctioneer is necessary, see § 320. Where

McComb *v.* Wright, 4 John. Ch. 659;
Goelet *v.* Cowdrey, 1 Duer, 132; Bam-
ber *v.* Savage, 52 Wis. 113.

(k) Smith *v.* Arnold, 5 Mason C. C.
417.

(l) Gwathney *v.* Cason, 74 N. Car. 7
(where the auctioneer, immediately
after the sale, went a short distance to
his office, and began drawing a deed in
pursuance of the contract).

(m) Hunt *v.* Gregg, 8 Blackf. 109;
see, *contra*, Barclay *v.* Bates, 2 Mo. App.
145, see *infra*.

(n) White *v.* Watkins, 23 Mo. 426.

(o) *Id.*

(p) Church (Trustees of Episcopal)
v. Wiley, Riley's C. C. 160.

(q) Jelks *v.* Barrett, 52 Miss. 322.

(r) Crooks *v.* Davis, 6 Grant. (U.
C.), 319.

(s) Barclay *v.* Bates, 2 Mo. App.
145.

(t) Daniel *v.* Harley, 3 Strobb. 233.

(u) Goelet *v.* Cowdrey, 1 Duer, 140.

(v) Hicks *v.* Whitmore, 12 Wend.
548.

an auctioneer made an insufficient entry at the time of sale, and completed it in his sales book about an hour afterwards, though he failed to hold the purchaser under 2 R. S. of New York, 136, § 4, he is not liable to the seller in an action for negligence; for the act was new, not yet judicially interpreted, and the auctioneer used ordinary care.^(w) So in California, under a statute similar to that of New York, it was held that the memorandum must be made at the time of the sale, and that the day was not a unit in this connection.^(x) As to when the memorandum in the case of a sheriff's sale must be made see above.

§ 318. The auctioneer's clerk can make the memorandum,^(y) especially where the clerk writes at the auctioneer's dictation.^(z) A memorandum made by the auctioneer's brother and partner is sufficient.^(a) It has been said that where an auctioneer employs his clerk as an amanuensis to write down the purchaser's name, the clerk should call out each name before making the entry.^(b) This privilege is peculiar to the clerk of one selling at public sale; it does not belong to the clerk of a private person.^(c) As to sheriff's clerk, see *supra*. If done openly, the clerk of the owner of goods sold at auction may, it has been said, act as clerk.^(d) In South Carolina the clerk must be specially authorized,^(e) but see *Cathcart v. Keirnaghan, infra*. The clerk must make the memorandum in presence of the auctioneer and of the parties.^(f) The assent of the bidders to the clerk's act-

Memoran-
dum by
auction-
eer's clerk.

(w) *Hicks v. Minturn*, 19 Wend. 552.

(x) *Craig v. Godfroy*, 1 Cal. 415.

(y) *Penniman v. Hartshorn*, 13 Mass. 87; (*Inhabitants of*) *Alna v. Plummer*, 4 Greenl. 263; *Briggs v. Munchon*, 56 Missouri, 470; *Hart v. Woods*, 7 Blackf. 568; *Simmons v. Anderson*, 7 Rich. 71; *Sandford v. O'Donohoe*, 1 Rob. & Jos. U. C. Dig. 342-3; *Coate v. Terry*, 24 U. C. C. P. 573; *Ryan v. Salt*, 3 U. C. C. P. 87; *Elder v. McEwen*, 2 New Zeal. Jur. 122.

(z) *Cherry v. Long*, Phill. Law, 467.

(a) *McMullen v. Helberg*, L. R. 6 Irel. 463.

(b) *Moss v. Cohen*, 3 Vict. L. Rep. 205, as cited in 30 Moak, 670.

(c) *Hope v. Dixon*, 22 Grant (U. C.), 442.

(d) *Sandford v. O'Donohoe*, 1 Rob. & Jos., U. C. Dig. 342.

(e) *Entz v. Mills*, 1 McMull. Law Rep. 455.

(f) (*Inhabitants of*) *Alna v. Plummer*, 4 Me. 258; *Jelks v. Barrett*, 52 Miss. 322; *Smith v. Jones*, 7 Leigh, 170; *Hunt v. Gregg*, 8 Blackf. 109.

ing is sufficient.(g) The memorandum being made under the direction of the auctioneer, is regarded as his act.(h) The auctioneer having before the sale written out the description of the lands sold and name of vendor, and the clerk at the sale entered the price and purchaser's name, this is sufficient.(i) Where the auctioneer, as he was going out, was applied to by the principal, and told the latter that a clerk could make the memorandum of sale, and the principal did not object, the assent was sufficient.(j) The buyer by bidding sanctions the clerk's authority to make the memorandum;(k) as has been said, authority in the auctioneer's clerk is implied, when in view of all the bidders such a clerk is employed to whom all the bids are announced.(l) A receipt drawn by the clerk of the auctioneer at a different time and place from that of the sale, at which it did not appear that the auctioneer was present, is an insufficient memorandum.(m) An unsigned order by the clerk is insufficient.(n) A signature by the clerk as a witness is insufficient if it does not appear from the writing that he knew its contents.(o) The buyer at an auction sale is not bound by an entry made by the clerk, unless he knew of and acquiesced in the clerk's so acting.(p) The power of the clerk

(g) *Ijams v. Hoffman*, 1 Md. 423; *Hand v. Grant*, 5 Sm. & M. 508; *Harvey v. Stevens*, 43 Vt. 653; *Brent v. Green*, 6 Leigh, 16; *Smith v. Jones*, 7 Leigh, 165; *Doty v. Wilder*, 15 Ill. 407; *Johnson v. Buck*, 35 N. J. L. 338; *Fessenden v. Mussey*, 11 Cush. 127.

(h) *Doty v. Wilder*, 15 Ill. 410; see *Cherry v. Long*, *supra* (citing cases, *q. v.*).

(i) *Price v. Durin*, 56 Barb. 648.

(j) *Coles v. Tregothick*, 9 Ves. Jr. 242.

(k) *Bird v. Boulter*, 4 B. & Adol. 446; 1 Nev. & Man. 316; see *McQuade v. Warren*, 12 N. Y. Leg. Obs. 251.

(l) *Cathcart v. Keirnaghan*, 5 Strobb. 130, distinguishing *Meadows v. Meadows*, 3 McCord, 458, as a case where the memorandum was insufficient, and saying that in *Entz v. Mills* it does not

appear that the purchaser knew that the clerk was acting for the auctioneer, and distinguishing *Coles v. Tregothick* as a case where the final sale was private.

(m) *McQuade v. Warren*, 12 N. Y. Leg. Obs. 251.

(n) *Fiske v. McGregory*, 34 N. H. 414; *Evans v. Ashley*, 8 Mo. 177.

(o) *Gosbell v. Archer*, 2 A. & Ell. 500; 4 N. & M. 494; distinguishing *Coles v. Tregothick* as a case where the signature showed the witness knew the contents.

(p) *Peirce v. Corf*, L. R. 9 Q. B. 216; *Hill v. Willis*, 6 Vict. Law Rep. 193, as cited in 30 Moak, 670; see 8 Ir. L. T., 357, regretting that *Peirce v. Corf* extends the harsh rule of *Farebrother v. Simmons* rather than that of *Bird v. Boulter*.

to make the memorandum was denied in one case, and this in another case in South Carolina(*g*) has been positively stated of a vendue-master, and giving as a reason that his book is made by law the evidence of the contract.(*r*)

§ 319. The party seeking to charge cannot act as auctioneer to make the memorandum;(s) as to judicial and sheriff's sales see above. The auctioneer, as has already been said, must be a public one, and not a mere agent of the vendor.(*t*) It has been suggested by Lord Erskine, that the vendor could be auctioneer and make the memorandum; *sed quære*,(*u*) a trustee cannot act as auctioneer so as to bind by his memorandum at his own sale.(*v*) So, where the trustee employed another to cry for him, but himself made the memorandum.(*w*) Nor can an administrator so act as auctioneer.(*x*) The point was raised in a Louisiana case, but not decided.(*y*) The rule is the same even though the administrator professed to act as clerk of the auctioneer, unless he be regularly appointed clerk by the latter.(*z*) The general rule as to administrators applies to guardians.(*a*) But it was held that a member of a vestry might be auctioneer to sell a pew and make the memorandum.(*b*) The party seeking to charge cannot authorize a

Who may act as auctioneer, and who may sue on the memorandum.

(*g*) *Meadows v. Meadows*, 3 McCord, 458; but see *Cathcart v. Keirnaghan*, distinguishing it on the ground that there was no sufficient memorandum made by any one; see *Peirce v. Corf*, L. R. 9 Q. B. 216.

(*r*) *Wolfe v. Sharpe*, 10 Rich. 63, citing *Entz v. Mills*, and distinguishing the case of an administrator's sale. In *Entz v. Mills* (1 McMull. 453) the clerk stood a short distance from the auctioneer, and at his dictation made the entries, and there is no reason to suppose that the purchaser did not know that the clerk was acting, yet the memorandum was held insufficient.

(*s*) *Smith v. Arnold*, 5 Mason, 434; *Farebrother v. Simmons*, 5 B. & Ald. 334 (citing *Wright v. Dannah*); *Anderson v. Chick*, Bailey's Eq. 118.

(*t*) *Anderson v. Chick*, Bailey's Eq. Rep. 118.

(*u*) *Buckmaster v. Harrop*, 7 Ves. 344; 13 Ves., 473 (see notes to Amer. ed.).

(*v*) *Tull v. David*, 45 Mo. 445.

(*w*) *Adams v. Scales*, 1 Baxt. 339; so a commissioner in partition; *Hutton v. Williams*, 35 Ala. 515.

(*x*) *Smith v. Arnold*, 5 Mason, C. C. 414; *Wingate v. Herschaner*, 42 Ia. 507.

(*y*) *Lafiton v. Doiron*, 12 La. Ann. 165.

(*z*) *Carroll v. Powell*, 48 Ala. 302.

(*a*) *Bent v. Cobb*, 9 Gray, 397.

(*b*) *Stoddert v. Vestry of Port Tobacco*, 2 G. & J. 229.

clerk to make the memorandum.(c) The rule has been broadly laid down, that an auctioneer seeking to charge cannot rely on a memorandum made by himself.(d) Nor where he is sought to be charged, will it be presumed that he did his duty, and made the memorandum where he pleads the Statute of Frauds.(e) At this point it will be well to bear in mind the distinction between one interested previous to the sale, and after acting as auctioneer seeking to bind by his memorandum then made, and the case of a mere auctioneer who has no interest in the matter beyond what he acquired by the particular exercise of his profession, and who sues only for his fees, or because the law directs him to lend his name in suits to enforce the contracts made with him in his official character.(f) An auctioneer may sue in his own name for goods sold.(g) The authorities now under consideration belong to the category of those relating to auctioneers only as such. Where the auctioneer sues, he can rely upon a memorandum made by his clerk; see *supra*, § 318, as to memorandum by the party interested.(h) "It should be remarked that it is questionable whether an action at common law can be sustained by the sheriff on a contract of sale on execution effected through his own agency in the capacity of an auctioneer. It was held in *Wright v. Dannah*, 2 Camp. 203, and *Farebrother v. Simmons*, 5 B. & Ald. 333, that an auctioneer could not sue on a contract evidenced by his own memorandum of the sale, on the ground that the agent, whose signature can bind the purchaser, must be some third party, and not the other contracting party on the record. But the

(c) *Carmack v. Masterson*, 3 Stew. & Port. 413; *Ijams v. Hoffman*, 1 Md. 435; *Frost v. Hill*, 3 Wend. 386; *Clarkson v. Noble*, 2 U. C. Q. B. 364.

(d) *Robinson v. Garth*, 6 Ala. 204; *Hand v. Grant*, 13 Miss. 508 (distinguishing the case of a sheriff's sale; see above).

(e) *Baltzen v. Nicolay*, 53 N. Y. 467.

(f) See *Buckmaster v. Harrop*, 13 Ves. 456.

(g) *Coate v. Terry*, 24 U. C. C. P. 573.

(h) *Bird v. Boulter*, 1 N. & M. 316; 4 B. & Adol., 446 (and on the ground that the clerk is a third person, distinguishing *Wright v. Dannah*, *supra*, and *Farebrother v. Simmons*, *supra*, *Cathcart v. Keirnaghan*, 5 Strobh. 130, taking the same view of these cases; so, also, *Johnson v. Buck*, 35 N. J. L. 340 (citing cases *q. v.*).

correctness of these decisions was doubted in the case of *Bird v. Boulter*, 4 B. & Adol. 443; Sug. on Vend., 107. The cases, however, were not overruled. The objection, if valid, to a common law suit, is not applicable to this form of action, which is expressly authorized by the Statute whenever the sheriff makes a valid sale on execution, and the purchaser refuses to pay his bid.”(i) *Seemle*, where the auctioneer had no real interest, the mere fact that the contract was in such form that he might sue upon it, would not disqualify him from making the memorandum.(j) In a suit by the auctioneer for his fees, he cannot rely upon the memorandum of sale made by himself.(k)

§ 320. As to the requisites generally of a memorandum under the Statute of Frauds, see the chapters on the Memorandum, *passim*. That made by an auctioneer is not, as a rule, peculiar in its characteristics; it must show the whole contract; see the chapters on the Memorandum.(l) In England the catalogue or sales-list appears to be considered the proper place to make the entry of sale.(m) It is sufficient if the sheriff puts the purchaser's name and the price in the list of the insolvent's effects sold at the sheriff's sale.(n) A memorandum on a loose slip of paper is as valid as if made in a book.(o) But in a Mississippi decision it was said that, “especially in cases of realty, . . . this memorandum should be made in some book, catalogue advertisement, or paper of some sort containing the subject-matter and terms of sale, or so definitely referring to such paper as to make it a part of it, either by physical contact or by the reference.”(p) And *seemle* in New

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examples.

(i) *Hunt v. Gregg*, 8 Blackf. 108.

(j) *Bent v. Cobb*, 9 Gray, 398 (citing *Wright v. Dannah*, *Farebrother v. Simmons*, *Rayner v. Linthorne*, *Bird v. Boulter*, *Smith v. Arnold*).

(k) *Bleecker v. Franklin*, 2 E. D. Smith, 94.

(l) *Blagden v. Bradbear*, 12 Ves., Jr. 471.

(m) *Phillimore v. Barry*, 1 Campb. 513; *Cherry v. Long*, Phill. Law, 467 (the court assuming that in absence of

evidence to the contrary the sales-list contains, as usual, the terms of sale if any); *Peirce v. Corf*, L. R. 9 Q. B. 214 (regarding the signature in the catalogue more regular than that in the auctioneer's book).

(n) *Brent v. Green*, 6 Leigh, 16.

(o) *Gordon v. Sims*, 2 McCord Ch. 164; *Simpson v. Pettus*, 7 Ala. 455; *Daniel v. Harley*, 3 Strobb. 233.

(p) *Jelks v. Barrett*, 52 Miss. 322 (citing cases).

York the entry must be made in a book and not on a loose slip.*(q)* A deposit receipt executed at a different time and place from that of the sale, although on the same day, and executed by the clerk of the auctioneer when it is not even certain that the latter was present, is insufficient.*(r)* An entry in the auctioneer's book is sufficient.*(s)* A receipt for part of the price is sufficient.*(t)* In auctioneers' memoranda a brevity is permitted which would be fatal to an ordinary memorandum under the Statute of Frauds. Thus: "Dick—Dr. Kelly, \$725," written in the auction-book is enough.*(u)* So putting the purchaser's name and the price in a list of insolvent's effects sold by a sheriff is enough.*(v)* See, for a discussion of what is a sufficient memorandum of the sale of chattels by an auctioneer under the Statute of Frauds, the case in the note.*(w)* That an advertisement, etc., though signed by the vendor, will not bind him to a parol sale made thereunder, see chapters on the Memorandum. Such a memorandum shows no contract which will bind the vendor;*(x)* a deed is not necessary.*(y)* But in Louisiana the purchaser has a right to require such a conveyance as will truly show him what he has bought, and the conditions of the sale.*(z)* The *procès-verbal* of the auctioneer appears to be sufficient for this purpose.*(a)* Under the

(q) Hicks v. Whitmore, 12 Wend. 551 (saying that the remarks of Lord Erskine, in Buckmaster v. Harrop, as to the auctioneer making minutes of the sale, and marking them with his initials, are not applicable under the New York statute).

(r) McQuade v. Warren, 12 N. Y. Leg. Obs. 251.

(s) Daniel v. Harley, 3 Strobb. 233, holding, indeed, that as against all parties but the auctioneer (in this case the sheriff) an entry in the book was necessary, but that *semble* as against himself, when not representing creditors or others, any writing would be enough. But see Peirce v. Corf, L. R. 9 Q. B. 214, saying that the auctioneer should sign the catalogue, and that an

entry in the book was only valid if the latter contained the conditions of sale.

(t) Keys v. Goldsborough, 2 Harr. & Johns. 371 (there was also a bill of sale executed by the auctioneer).

(u) Kelly v. Brooks, 25 Ala. 527 (there was, however, delivery of the negro sold).

(v) Brent v. Green, 6 Leigh, 16.

(w) Mushat v. Brevard, 4 Dev. 76.

(x) Dyas v. Stafford, L. R. 9 Irel. 523, reversing, S. C., 7 Irel. 599.

(y) Keys v. Goldsborough, 2 Harr. & Johns. 371, where, in an ejectment, judgment was given for the plaintiff, the vendor.

(z) Canal Bank v. Copeland, 6 La. 550.

(a) Macarty v. New Orleans Canal Co., 8 Robins. 104.

New York Revised Statutes, pl. ii., c. vii., tit. 2, § 4, the name of the person on whose behalf the sale is made must appear; see *supra*.(b) Where the auctioneer's memorandum, giving the article sold, the price, and the name of the buyer and seller, was entered in a book, on which was printed "J. Harvey's Auction-book," Harvey being the auctioneer who sold, it is sufficient.(c) An unsigned order by a clerk is insufficient.(d) So an imperfect return of the execution referring to a private memorandum-book of the auctioneer.(e) So where the auctioneer's clerk signed a receipt for part payment of the price "as per agreement;" and at the same time and place the plaintiff signed a memorandum of the contract signed by the auctioneer's clerk as a witness.(f)

(b) Hicks v. Whitmore, *supra*.

(e) Remington v. Linthicum, 14 Pet.

(c) Harvey v. Stevens, 43 Vt. 653. 93.

(d) Fiske v. Gregory, 34 N. H. 414. (f) Gosbell v. Archer, 2 A. & Ell. 503; 4 N. & M. 494.

CHAPTER XII.

THE MEMORANDUM IN GENERAL—VARIOUS KINDS OF MEMORANDA.

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| <p>§ 321. Memorandum required by the Statute of Frauds at law and in equity; oral evidence to supplement writing not admissible.</p> <p>§ 322. Exceptions to the last rule.</p> <p>§ 323. How far oral evidence admissible to show that a memorandum is insufficient.</p> <p>§ 324. General requisites of the memorandum. No special form necessary.</p> <p>§ 325. Memorandum is not the contract itself.</p> <p>§ 326. Lost writing can be proved by parol.</p> <p>§ 327. Example of memoranda. Bills of parcels.</p> <p>§ 328. Letters.</p> | <p>§ 329. Receipts.</p> <p>§ 330. Account stated.</p> <p>§ 331. Promissory notes.</p> <p>§ 332. Wills.</p> <p>§ 333. Arbitration and record evidence generally.</p> <p>§ 334. Case stated Affidavit.</p> <p>§ 335. Answer in equity—and pleading generally.</p> <p>§ 336. Memoranda under seal; and deed generally. Title bond.</p> <p>§ 337. Deed as a memorandum. Insufficient deed. Undelivered deed.</p> <p>§ 338. Deed ordinarily the fulfilment not the evidence of the contract.</p> <p>§ 339. Telegram.</p> <p>§ 340. Record of corporation.</p> |
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§ 321. THE effect of the Statute of Frauds is to require written evidence of certain transactions: what writing will satisfy these requirements is the subject now for consideration. (a) There is, it may be noted, no difference between law and equity in the standard by which evidence offered under the Statute is to be tried, and none of the equitable exceptions, which have been so prodigally made to the strict letter of the written law, touch upon this point. (b) Before taking up the question as to the nature of the memorandum required, it will be well to dispose of the collateral point of the admissibility of oral evidence to supple-

(a) The distinction between sufficient and insufficient memoranda, is said by Pollock, C. B., in *Matthews v. Baxter*, 21 W. R. 741, to be fine.

(b) *Morison v. Turnour*, 18 Ves. 175.

ment the writing. The doctrine of the inadmissibility of parol evidence, to add to the memorandum required by the Statute of Frauds, forms the subject of some discussion in another part of the present work, and will, therefore, be only partially treated of here; the point is of less importance, because of the more frequent exclusion of such evidence by the common law rule, older than the Statute of Frauds, which presumes the writing to contain the whole agreement of the parties. There are, however, a number of decisions which, as examples of the various applications and modifications of the general rule, are not without interest. In the first place, as has been said, oral evidence is not competent to supply defects in or in any way to add to the note in writing required by the Statute of Frauds.^(c) It has been said that oralevidence can no more supply defects, in the agreement, than it can supply the want of an agreement.^(d) While memoranda, manifestly imperfect, may at common law be supplemented by verbal evidence, this rule does not apply under the Statute of Frauds.^(e) So oral proof of such portions of a writing, as had been read to the complainant, will not be admitted to lay ground for the specific performance of such portions.^(f) In the case of a sales-note, materially altered by the broker after sale made, verbal evidence of how much of the memorandum is good, and how much is not, is inadmissible.^(g) Where an endorser of a promissory note has been discharged, a subsequent oral promise to pay the note on consideration of forbearance to the maker, cannot be tacked to the endorsement, so as to cause the latter

- (c) *Hales v. Van Berchem*, 2 Vern. 619; *Loeffes v. Lewen*, Prec. in Ch. 372; *Blair v. Snodgrass*, 1 Sneed, 25; *Clarke v. Russell*, 3 Dallas, 424; *Vaughn v. Smith* 58 Iowa, 557; *Bell v. Bruen*, 17 Peters, 168; *Williams v. Morris*, 95 U. S. 454; *Stocker v. Partridge*, 2 Robert. 202; *Wright v. Weeks*, 25 N. Y. 155; 3 Bosw., 373; *Sale v. Darragh*, 2 Hilton, 196; *Waterman v. Van Every*, 3 Alb. L. J. 304; *Hall v. Soule*, 11 Mich. 494; *Williams v. Robinson*, 73 Me. 195; *Guy v. Barnes*, 29 Ind. 104; *Brown v. Whipple*, 58 N. H. 229; *McConnell v. Brillhart*, 17 Ill. 360; *Scarritt v. St. John's Church*, 7 Mo. App. 178; *Johnson v. Granger*, 51 Tex. 43, citing cases.
- (d) *Godwin v. Collins*, 4 Houst. 55; *Parrish v. Koons*, 1 Parson's Eq. 84, citing *Blagden v. Bradbear*; *Ripley v. Page*, 12 Vt. 355.
- (e) *Musselman v. Stoner*, 31 Pa. St. 270; *Potter v. Hopkins*, 25 Wend. 417.
- (f) *Brodie v. St. Paul*, 1 Ves. Jr. 333.
- (g) *Powell v. Divett*, 15 East, 31.

to evidence the subsequent promise.(h) The following proposition has been held not to be true: That a promise by an endorser to pay a note, from which he had been discharged by a failure to make due presentment and notice, is *nudum pactum*, and therefore void. This is because it rests upon the unfounded assumption that it is the new promise, and not the original note, which is the cause of action. The new promise does not constitute the cause of action; it only operates as a waiver of the necessity of proving facts—demand and notice—which, but for such promise, would be necessary to sustain an action on the original note, which is the real cause of action, and the contract evidenced by the note cannot be said to be *nudum pactum*, nor is it within the Statute of Frauds.(i) On the other hand, a verbal agreement by the sureties on an officer's bond that, on his reelection after his first term had expired, the old bond should continue is void under the Statute of Frauds.(j) Parol evidence of the declarations of an auctioneer is not competent to explain an ambiguity arising from the collocation of two of the instruments of the sale;(k) or generally to eke out the memorandum.(l) An oral declaration of the auctioneer at the time of sale was admitted to show that the purchasers knew that the goods were of a kind inferior to that set out in the catalogue.(l') Where a sales-note is silent as to a warranty, the latter cannot be proved by parol, it would contradict the writing.(m)

§ 322. In New York, however, it was held, where the sheriff stated that a smaller tract was taken out of the larger tract sold, and did not pass with it, and the purchaser heard this, that the oral evidence of the sheriff's declaration was admissible, the sheriff's vendee,

Exceptions
to the last
rule.

(h) *Peabody v. Harvey*, 4 Conn. 122; see, however, *Uhlen v. Farmers' Bank*, 64 Pa. St. 409, where such a promise was regarded as not within the Statute of Frauds, the promisor, for the credit of his name, engaging to pay the debt; see § 353 and § 357.

(i) *Fell v. Dial*, 14 Shand. 251, citing 2 Dan. Negot. Inst., § 1147; 1 *ib.*, § 557, N. S.

(j) *German Vet. Soc. v. Fisher*, 1 Kent Law Reporter, 57 (S. C. Ky.).

(k) *Higginson v. Clowes*, 15 Ves. 521.

(l) *Jenkinson v. Pepys*, cited in *Higginson v. Clowes*, 15 Ves. 521.

(l') *Shelton v. Livius*, 2 Tyrw. 432; 2 Cr. & J. 414.

(m) *Meyer v. Everth*, 4 Campb. 22.

the plaintiff, having lain by for fourteen years without asserting his claim to the smaller tract.⁽ⁿ⁾ Where the value of the goods is less than £10, an oral explanation by an auctioneer, given at the sale, is admissible, the exclusion of such proof is due entirely to the Statute.^(o) In an English Exchequer case a remark of Baron Martin's is open to the construction, that by reference a verbal contract can be incorporated into the memorandum under the Statute of Frauds.^(p) Where a memorandum is insufficient, and, though there is no proof of fraud, verbal evidence of the true and entire contract may be given, notwithstanding the Statute of Frauds.^(q) A decision under the act of Congress, which requires contracts with certain officers of the Federal government to be in writing, throws light on the question before us; the facts were that, in a written transportation contract, it was provided that all orders by the government officer stopping the trains should be in writing; a quartermaster wrote an order in which he stopped the supply train, and ordered the goods stored, reciting that, "in consequence of the bad condition of the transportation and the lateness of the season, I judge it unsafe and detrimental to the interests of the government for the train to proceed further this season," and it was held that the government was not bound by this so as to exclude parol evidence that it was the contractor's fault that he was not ready to go on, and that the contractor's petition to have allowance for lay-days, stipulated for in the first contract, should be dismissed. The court said that in three classes oral evidence was refused: where the law required writing; where parties made the writing, and where there is a material writing whose existence is disputed. The quartermaster's memorandum comes under none of these heads.^(r) Oral evidence was admitted to show that "£50 more of premium" in one letter and "£300" in another meant the same thing.^(s) In a case where the variance between bought and sold notes was shown to be immaterial,

(n) *Bartlett v. Judd*, 21 N. Y. 203.

(r) *Bulkley v. United States*, 8 Ct.

(o) *Eden v. Blake*, 13 M. & W. 617. of Cl. 195.

(p) *Catling v. Perry*, 2 F. & F. 141.

(s) *Skinner v. McDonall*, 2 De G. &

(q) *Fiske v. Gregory*, 39 N. H. Sm. 265; 17 L. J., N. S., Ch., 347.

Martin, B., said that parol evidence was admissible to explain the circumstance of this kind of contract.^(t) Evidence to alter the liability of the endorsers of a note is inadmissible, as, for example, to show a liability only as special guarantors, and an endorsement of a negotiable instrument is a compliance with the Statute of Frauds.^(u) But evidence of usage is admissible to explain the terms of a written contract.^(v) A memorandum referring for the identification of the subject matter to a parol contract, then subsisting or thereafter to be made, is insufficient.^(w) Where a verbal offer by the vendor of land is accepted in writing by the vendees, and afterwards the vendor tenders an executed deed, but in the interval the vendees have modified their acceptance, the Statute of Frauds was held not to be complied with.^(x) And where a memorandum, which related to the negotiation of lands about to be taken for a railway, referred to the question of compensation, as to be settled either by an arbitration or a jury, at the option of the owner, it is insufficient.^(y) In a Scotch case an informal

(*t*) *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J. Exch., 191 (citing *Rogers v. Hadley*).

Where a memorandum of terms was proposed by each party, and the defendant company made certain alterations which were accepted by the plaintiff, and these were correctly stated in the latter's draft, which was presented to the defendant at a meeting of their company and accepted by them, and a minute to that effect was entered and signed by the chairman, it was held that this was sufficient, and was the true evidence, though the defendant's solicitor, in altering his draft, stated the terms differently from the plaintiff's draft, and the latter was endorsed with a resolution accepting it, and a minute of the acceptance was endorsed on the draft by the chairman; *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 321; 46 L. J. Q. B., 219; 36 L. T., N. S., 144.

(*u*) *Zellweger v. Caffé*, 5 Duer, 91, citing *Parks v. Brinkerhoff*.

(*v*) *Dana v. Fiedler*, 2 Kern, 40; but evidence to show the trade in which the parties were engaged, has been held not to make up an inherent deficiency in the memorandum; *Drake v. Seaman*, 27 Hun, 63.

(*w*) *Hyde v. Cooper*, 13 Rich. Eq. 250; see *Whelan v. Sullivan*, 102 Mass. 206; see *Uhler v. Farmers' Bank*, *supra*.

(*x*) *Gummere v. Trustees, etc.*, of Omro, 45 Wis. 386.

(*y*) *Morgan v. Milman*, 3 De G., M. & G. 24; 22 L. J. Ch., 897; distinguishing *Gregory v. Mighell*.

In an Alabama decision the following views were expressed as to the admissibility of parol evidence to supplement the writing; said the court: It is to be observed that this is not a contract which is required by law to be in writing, yet even in regard to

memorandum of lease was held to be made valid by possession taken by the tenant.(z) It has been said that a contemporaneous modification of a writing need not be alleged in a plea to have been written, it will be so assumed.(a)

§ 323. Parol evidence has in a few cases been admitted to show that a written contract, apparently valid, is really within the Statute of Frauds, and incomplete thereunder; as to show that a promise was really for the debt of another.(b) And where the promise was to pay the rent of certain premises on a certain date

How far oral evidence admissible to show that a memorandum is insufficient.

parol evidence was admitted to show that the house was occupied by a third person, and that the promise was to answer for his rent, and therefore within the Statute of Frauds; *semble*, however, that the substance of these extrinsic facts appeared in admissions in the pleadings.(c) As to the

such contracts, as, for example, a devise, it is well settled, that when the subject of a devise is described by reference to some extrinsic fact, parol proof of such fact may be made. The law is the same in respect to deeds and other instruments, as held in this court in *Ellis v. Burden*, and fully expounded by Sir William Grant in *Ogilvie v. Foljambe*, 3 Mer. 52, and see the long train of authorities printed by Cowen. We consider it therefore clear that the contract is not void because it refers to the terms of another contract existing between other parties, as one of the stipulations then agreed upon, but that proof may be made what those terms thus referred to were and enforced as part of the contract; *Casey v. Holmes*, 10 Ala. 786. Generally as to how far oral evidence is admissible to interpret memoranda under the Statute of Frauds, see *Sugden, Vend. I.* (p. 134), *et seq.*

(z) *Ross v. Ross*, Hume, 775; see chapters on Part Performance.

(a) *Waxman v. Barnard*, 2 Vict. L. Rep. Law, 240.

(b) *Sackett v. Palmer*, 25 Barb. 179;

semble, contra, Union Bank v. Corcoran, 5 Cranch, C. C. 513.

(c) *Clark v. Richardson*, 4 E. D. Sm. 174; see *Vaughn v. Smith*, 58 Iowa, 557. Where the plaintiffs drew bills upon the defendant's son, the person answered for, and who accepted the bills, and the plaintiff endorsed them to the defendant, who re-endorsed them to the plaintiffs; it was held that while, under ordinary circumstances, the plaintiffs could not sue the defendant, because the latter could thereupon immediately sue them, and a circuit of action would be established, that this did not apply where the defendant, as here, had given no consideration and had orally agreed to become surety; *Bagally, L. J.*, doubted the admissibility of the oral promise, even for this purpose; *Wilkinson v. Unwin*, 46 L. T. 123 (C. A.); see *Holmes v. Durkee*, 1 Cab. & Ell. 24. In *Eggleston v. Wagner*, 46 Mich. 610, it was said that the sufficiency of the contract depended upon the writing, and not upon the doubts raised extrinsically. See *S. C.*, 49 id. 222.

admissibility of oral proof of the existence of a price, in order to show that the memorandum not stating such price is defective, see § 410.(d) It may appear strange that, on a point of so much importance as that which decides whether or not oral evidence is admissible to show that the memorandum purporting to comply with the Statute of Frauds does not truly state the actual contract, there should be so few authorities as those which will presently be given. But it should be remembered that the admission of such evidence has seldom been allowed, except as a matter of defence, or to prove an agent's contract to be unauthorized ;(e) or to establish fraud or mistake. These three subjects being treated separately elsewhere, there remain for consideration only those cases in which, though the memorandum stated a seemingly entire contract, the court received parol evidence to show that it was imperfect in leaving out one or more of the terms of the real agreement made orally by the parties. It is true that in most, if not all, of the cases the parol evidence is offered as a *defence* to a recovery on the memorandum, but this distinction has not been expressly made in the decisions, and therefore modern English law must be considered as settling broadly the admissibility of parol evidence to show that a memorandum under the Statute apparently containing the whole agreement contains only a part. Where, therefore, a memorandum offered consisted of an invoice, and a letter of the defendant's acknowledging its receipt and finding fault with the articles, certain glass, named in it other than those whose value was sued for, parol evidence was admitted to show that the glass was to have been of the best quality ; and for not containing this stipulation the memorandum was held insufficient ; there was no evidence that the glass was not, in fact, of the best quality. Channell, B., said : "I think that when we inquire whether a verbal contract corresponded to the writing, we may be letting in the very evils which the Statute was meant

(d) *Jeffcott v. North British, etc.*, of Ely ; see as to memoranda, not giving the terms and conditions of the contract, § 402 *et seq.*, § 409 *et seq.*, and § 429.

(e) *Clinan v. Cooke*, 1 Sch. & Lef. 31 ; and see *Chinnock v. (Marchioness*

to avoid, but it is too late to dispute the cases on this subject.”(f) In an Irish case which went off on another point it was said where the pleadings set out a contract reserving a price, and no price appeared in the memorandum, there was a fatal variance; but the court went on to announce the unqualified doctrine that an apparently sufficient memorandum might be shown by parol to be imperfect, in not stating the price actually stipulated for.(g) In a recent Irish case oral evidence of the defect of a memorandum, in not mentioning that goods were sold under a warranty, was received.(h) In a case arising under 9 Geo. IV., c. 14, s. 7, which uses the word “value” instead of “price,” it was held that if no price was stipulated for, the seller might recover on parol evidence of the value of the article sold; but that if the parol evidence showed that a price had been agreed upon, then the memorandum would be insufficient in not stating it.(i)

In a Wisconsin case, it was held that a writing to bind must represent the real contract between the parties, and where a writing signed in blank is incorrectly filled up, the writing is not evidence, and the contract remains in parol.(j) In a recent case in Wisconsin it was said that oral evidence to show a memorandum to be incorrect was only admissible when the party to be charged has not assented to the memorandum.(k) Where a memorandum by its silence on the point gave rise to the implication of a cash sale, certain conditions of sale inadmissible as not being connected with the

(f) *McClellan v. Nicolle*, 4 L. T., N. S. 863; 7 Jur., N. S., 999 (considering *Bailey v. Sweeting*); and see *Clinan v. Cooke*, 1 Sch. & Lef. 31; *Rogers v. Hadley*, 2 H. & C. 247; *Tindal v. Touchberry*, 3 Strobb. 178; *Stoutenburgh v. Tompkins*, 1 Stockt. 336; see *Jacheus v. Nicolson*, 28 Alb. L. J. 17 (S. C. Ga.).

(g) *Jeffcott v. North British, etc., Co.*, Ir. Rep., 8 C. L. 191; see *Holman v. Bank*, 12 Ala. 369, § 402.

(h) *M'Mullen v. Helberg*, L. R. 6 Irel. 463; 4 Irel., 94.

Where flour was sold at auction under a warranty (*semble* oral) that it was

first class, and this warranty the plaintiff did not deny; the defendant is not liable when he was refused permission by the plaintiff to try the quality of the flour; the bought notes tendered him left out the words “first class;” *Pratt v. Rush*, 5 Vict. L. R. Law, 423.

(i) *Hoadly v. M'Laine*, 10 Bingh. 486.

(j) *Rounsavell v. Pease*, 45 Wis. 508.

(k) *Wiener v. Whipple*, 10 No. West. Rep. 434; 24 Alb. L. J. 509 (S. C. Wis.); see *London and Birmingham R. W. v. Winter, Cr. & Ph.* 61.

memorandum can be used to show that the latter is imperfect because not stating a sale on credit.^(l) To help out a memorandum defective among other things in not stating a price, the court will not necessarily infer that the payment was to be forthwith.^(m) Where the memorandum relied on was a deed delivered in escrow, parol proof was admitted to show that the condition of this delivery differed from those stated in the deed.⁽ⁿ⁾ Where the defendant accepted a written contract of sale of land executed by the vendor, it was held that he was bound and could not, except on the ground of fraud or mistake, claim that the plaintiff had orally warranted that the land should contain a given amount of timber, and that the plaintiff had promised to pay at a certain rate for the shortage, the memorandum was apparently sufficient, and oral evidence to alter it was inadmissible.^(o) Oral evidence that part of the contract was contained in a conditional acceptance of the writing is admissible.^(p) In another case it was said that the defendant might set up an oral variation of the written contract, and put it to the plaintiff's election whether he would accept the change or have his bill dismissed.^(q) As has been said, all this amounts to saying that while a plaintiff cannot recover but on written evidence, the defendant can defeat recovery by oral proof of a contract different from that contained in the writing. In another place the whole question will be considered, and an effort made to ascertain the precise force of the axiom that the Statute is a shield and not a sword. The second class of cases is that where oral evidence is held sufficient to show that a memorandum made by an agent is incorrect, and therefore unauthorized. If the authority, generally of an agent, to make the writing may be given by parol, it seems consistent to allow the same kind of

(l) *Hinde v. Whitehouse*, 7 East, real consideration of a deed, see chapter 568; see, also, *Mahalen v. Dublin Distillery Co.*, Ir. Rep. 11 C. L. 88 (citing on Voluntary Performance.

(m) *Hubbard v. Marshall*, 50 Wis. cases); *Flintoft v. Elmore*, 18 U. C. C. 327.

P. 281.

(n) *Hopkins v. Roberts*, 54 Md. 316.

(o) *Campbell v. Thomas*, 42 Wis. 441; as to oral evidence to show the

(p) *Boys v. Ayerst*, 6 Madd. 324.

(q) *London and Birmingham R. W. v. Winter*, 1 Cr. & Ph. 61.

evidence to show the extent of that authority, *i. e.*, to formulate a certain contract and no other.(*r*) In a New Jersey case it was said that a defendant cannot resist a specific performance, on the ground that the agreement entered into differs from that which was reduced to writing, without showing that the difference was the result of fraud, mistake, accident, or surprise.(*s*) This last class, were they not common law decisions, might be ranged under the head of the equitable defences of fraud or mistake, and so, perhaps, the cases first given; and whether the measure of proof required to establish a parol defence against a suit on a memorandum sufficient on its face, should not have been the same as that which a chancellor calls for to establish fraud or mistake, as alleged to defeat a writing, might be strongly argued were the question open. Where the evidence is offered to show that the memorandum is invalid in not stating the price, a good reason can be given for the rule, *viz.*, that if the memorandum sued on is taken to be complete, there never was a price reserved; and either the transaction was a gift, or the payment was made at the time the writing was executed, so that the plaintiff by setting out in his pleading an unfulfilled contract, under which a price was agreed to be paid, is met at once by a variance between his allegations and his proofs, and he admits that the memorandum he relies on is defective. But this suggestion is of value only where the plaintiff attempts himself to enforce a parol term, and does not apply where recovery is sought on the memorandum as it stands, and the defendant's offer to show by verbal testimony that the real contract was different.(*t*) And, apart from authority, it would be difficult to maintain that a memorandum under the Statute of Frauds is more open to oral contradiction than a common law writing. The disproof may be admitted in support of an equitable de-

(*r*) See *Pitts v. Becket*, 13 M. & W. 751; *Chinnoek v. Ely* (Marchioness of), 11 Jur. N. S. 329; 13 W. R. 597 (and see table of cases for other citations of this case), and *Remick v. Sandford*, 118 Mass. 107, where the rule in the text is plainly laid down; see *Campbell v. Thomas*, 42 Wis. 441.

(*s*) *Stoutenburgh v. Tompkins*, 1 Stockt. 335, and saying that the case of *Legal v. Miller*, 2 Ves. 299, does not on careful examination establish a contrary doctrine.

(*t*) See *Jeffcott v. North British, etc., Co.*, *supra*.

fence in the nature of fraud or mistake in either case; but the Statute having merely required that the parties should enter into a written contract, the latter once made does not differ from the same contract voluntarily put into writing.

It is just here that the divergence, which is a real and radical one, takes place; there are those who contend, as Professor Langdell does, unqualifiedly,^(u) that the writing, not being the contract, is only sufficient if it states the latter fully and truly, and that, if it does not do so in a given case, this may be shown by parol; which either means that the memorandum under the Statute of Frauds can only be varied, or contradicted when a common law writing might, in which case there is no ground of dispute; or, as is more probable, and as the English cases certainly appear to hold, the contract itself, and the note being taken as distinct, oral evidence can be brought to show that the original contract is not merged and fully stated in the note, as is presumed in the case of a common law writing. No one will contend that a memorandum, sufficient to satisfy the Statute of Frauds, would not be sufficient evidence of a contract in absence of the Statute; and the memorandum, under the Statute of Frauds, being the act of the parties and the statement which they choose to make of their agreement, why should we not suppose that, apart from fraud or mistake, all previous negotiations, or even concluded agreements, are merged in the writing which shall, as at common law, stand *instar omnium*. It is not meant to be said that in any of the decided cases the admission of the oral evidence was not right; as to this no opinion is here expressed, but it is meant to be said that the unqualified statement that the written note, under the Statute of Frauds, can be orally shown to be incorrect, is not (the equitable exceptions apart) the principle on which these decisions should have gone. Whether the memorandum follows the contract or not is a question of fact for the jury.^(v) Where the parties contemplated a

(u) Sales. Index, §§ 60, 62, 70, 71; force and clearness, so that the Harvard the writer has a letter from Professor Law School seems at one on the point. Thayer pleading the same view with (v) Hawkins v. Chase, 19 Pick. 502.

writing, there is no contract till the writing is made. (w) The decision in *Jervis v. Berridge*, which will be cited in several places in the present work, may receive perhaps some explanation from the principle that oral evidence is admissible to show that a memorandum does not contain the whole contract. Vice-Chancellor Malins, whose ruling was affirmed above, placed his decision frankly on the ground of fraud; the facts were these: the plaintiffs, who had a written contract of sale of land from the L. S., sold their interest to the defendant upon certain terms, and gave him such written evidence of their agreement with him as would enable him to get a conveyance from the L. S.; having so got his deed from the L. S., he refused to perform his promise to the plaintiffs, who thereupon came in not to have the oral contract with him performed, but to have it cancelled, in order that they might carry out the first contract with the L. S.; and it was so ordered. (x) The Supreme Court of Maine, in a recent case, expresses itself on this subject with no uncertainty; the court said: "When a memorandum is made, etc., as, etc., a complete memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition . . . parol evidence is incompetent to contradict or vary its terms; and if, in fact, some of the conditions actually made be omitted from it, the party defendant cannot avail himself of them. . . . Such is the general rule governing written contracts, and the Statute of Frauds leaves it, together with its exceptions, as it found them." (y)

§ 324. We come now to the direct question, whether the writing itself complies with the rule of the law? The principles to be settled are, primarily, those which relate to the general characteristics of a valid memorandum under the Statute of Frauds. First, then, no special form is needed; any writing properly executed, of however crude a character, is

General
requisites
of the
memoran-
dum; no
special
form
necessary.

(w) *Methudy v. Ross*, 10 Mo. App. 101; see *Liverpool Bank v. Eccles*, 4 H. & N. 143; *Hipp v. Huchett*, 4 Tex. 25, § 359.

(x) *Jervis v. Berridge*, L. R. 8 Ch. App. 359.

(y) *Williams v. Robinson*, 73 Me. 195, citing *Benj. Sales*, § 205, and many cases. See *Hubbard v. Marshall*, 50 Wis. 327, cited just above.

enough.(z) Anything, Lord Ellenborough said, was sufficient that was "under the hand of the party expressing that he had entered into the agreement" set out therein.(a) In the Supreme Court of the United States it was said that the Statute does not prescribe the form of a binding agreement, it is sufficient that the *natural* parts of it appear, either expressed, or clearly to be implied.(b) That the Statute requires only a memorandum is shown by the fact that only one party need sign, and that the consideration need not be expressed.(c) This rule was applied in New York to the difficult question as to the liability which the law shall affix to the act of a stranger to the principal contract, who puts his name to the paper evidencing it; and no form being required by the Statute of Frauds, the court relied upon the relations of the parties and the circumstances of the case in arriving at their conclusion.(d) A wider application of this principle was made in Alabama, where, after stating that an agent of the parties had made a memorandum of the contract on a piece of paper, the court said: "True, this does not appear *in totidem verbis*, but it is the inference of reason and law from the statement of the witness, that he was acting as deputy for the plaintiff on that day, and he then made a memorandum in writing of the sale. If this presumption is opposed to truth it would have been very easy for the defendant, by a single inquiry addressed to the witness, to have caused a more full disclosure of the facts to be made.(e) Whether an informal writing will answer in Scotland has

(z) *Moore v. Hart*, 1 Vern. 114; *Boys* 425; *Shoofstall v. Adams*, 2 Grant
v. Ayerst, 6 Madd. 323; *Hurley v.* (Pa.), 212; *Sherburne v. Shaw*, 1 N.
Brown, 98 Mass. 546; *McCarthy v.* H. 159.

Kyle, 4 Coldw. 354; *Sheid v. Stamps*,
 2 Sneed, 172; *Atwood v. Cobb*, 16 Pick.
 230; *Cadwalader v. App*, 81 Pa. St. 210;
Wood v. Davis, 82 Ill. 312; *McConnell*
v. Brillhart, 17 Ill. 360; *Cushman v.*
Burritt, 14 N. Y. Week. Dig. 59 (S. C.
 N. Y.); *Jenkins v. Harrison*, 66 Ala.
 355; *Crockett v. Green*, 3 Del. Ch. 471;
Scarritt v. St. John's M. E. Church, 7
 Mo. App. 178-9; *Patton v. Rucker*, 29
 Tex. 407; *Martin v. Weyman*, 26 Tex.
 466; *Cosack v. Descoudres*, 1 McCord,

(a) *Shippey v. Derrison*, 5 Esp. 191.

(b) *Bell v. Bruen*, 17 Peters, 168.

(c) *Bird v. Munroe*, 66 Me. 341.

(d) *Parks v. Brinkerhoff*, 2 Hill (N.
 Y.), 663.

(e) *Simpson v. Pettus*, 7 Ala. 455.

For a consideration of the doctrine which really rules this case, viz., the failure of the party to be charged to set up the Statute, see chapters on Voluntary Performance and Pleading.

been questioned (but *semble* this is only in cases affecting the act of 1681); and when there is part performance (*rei interventus*) the proof is adequate.(f) The Scottish statutes have special provisions as to the writings required under them; and a running account, not being a holographic or tested writing, is open to investigation.(g)

§ 325. The writing need not be the contract itself executed as such by both parties; a note or memorandum, though subsequent to the making of the contract, if signed by the party to be charged, is sufficient.(h) Memorandum is not the contract itself. The memorandum is not the contract, but only the evidence of it.(i) The rule is the same both under the fourth and seventeenth sections of the Statute.(j) See *infra* as to when the contract takes effect when the memorandum is subsequent thereto; and as to how far when there are two writings the later is to be incorporated with the earlier see *infra*.(k)

(f) See *Ross v. Ross*, Hume, 775; *Burge, Surety*. 37.

(g) *M'Adie v. M'Adie*, Sess. Cas., 4th Ser., vol. x. p. 744; 20 Scotch L. Rep., 476; see *Littlejohn v. Hadwen*, ib. 6; *Bell v. Goodall*, ib. 600. As to writings against which the statute of limitations does not act as a bar till a certain time, see *Chisholm v. Robertson*, Sess. Cases, 4th Ser., vol. x. p. 760, distinguishing *North British R'way v. Sligo*, Sess. Cases, 4th Ser., vol. i. p. 315; *Chalmers v. Walker*, ib., vol. vi. p. 201; *Ross v. Shaw*, Morr. Dec. 11115; *Douglas v. Grierson*, Morr. Dec. 11116.

(h) *Coles v. Trecothick*, 9 Ves., Jr., 242; *Bradford v. Roulston*, 8 Ir. C. L. Rep. 472 (citing cases); *Grimes v. Hamilton Co.*, 37 Ia. 294; *Jenkins v. Harrison*, 66 Ala. 355; *Kuhn v. Brown*, 1 Hun, 246; see § 355 *et seq.*

(i) *Bluck v. Gompertz*, 7 Exch. 867; *Mirzell v. Burnett*, 4 Jones Law, 252.

(j) *Bradford v. Roulston*, 8 Ir. C. L. Rep. 472.

(k) In an early Scotch case, in which

the effect of a subsequent memorandum was considered, the court said that, "whether can cautionary be constituted without writing, there are some decisions where it had been found that a cautionary obligation could not be constituted without writing; but it is now held that writing is not *de essentia* of that contract; and, therefore, the obligation in this case is sufficiently proved by the acknowledgment of the subscription, and on that ground I am for altering the interlocutor. Where a man agrees verbally to become cautioner, I should doubt whether it be effectual without writing; but where, as in this case, he becomes bound under a promise to grant a bond, and upon that promise an assignation is granted, which is to divest the grantor of his property, this is such a *rei interventus* as alters the nature of the case, and must bind the cautioner to fulfil his engagement.

"Some of our decisions upon the effect of cautionary obligations have been ex-

§ 326. When the writing required by the Statute has been once executed, its contents can afterwards be proved by verbal evidence, if it should be lost or destroyed without fraud.^(l) And to the general doctrine, that where the law requires evidence to be in writing, the latter is the only proof which can be received, must be added the qualification that such writing exists, and is in the power of the party relying upon it.^(m) "The note in writing," in the language of a Pennsylvania decision, "which is sufficient to take a parol title out of the Statute of Frauds and Perjuries, must

roneous from the neglect of the proper distinction. In cases of cautionary, when the obligation is to extend over a feudal subject, writing is necessary, and until the cautioner and property be bound by the forms required by the act of 1681 there is *locus penitentiæ*. The cautioner in such a case may say: 'True, I did sign that obligation, but I have a right of retracting until I am bound by a formal deed.' So you found in the case of MacFarlane, and the decision, in so far as it regards heritable rights was pronounced on good grounds; yet we know that even in the case of feudal rights and deeds relating to heritage, informal deeds will bind a party, where (as in tacks) the deeds have been followed out by acts. In many cases you have, from the intervention of these acts, prevented parties from resiling and barred the *locus penitentiæ*. I think the distinction that has been made a just one, that where a cautionary obligation is *in nudis finibus* it may be resiled from; but where, as in this case, things are not entire, and a man assigns a debt upon an assurance, such as the pursuer received, it cannot be withdrawn. Had the conveyance by the pursuer, in consequence of which he divested himself, not been granted, the obligation on the cautioner would have remained *in nudis finibus*; but the assignation was

granted, and the money received on the faith of the defender's letter, and it is now too late to retract; we must hold him as bound; *Sinclair v. Sinclair*, Bell, Fol. Cases, 142, doubting *Edmonstone v. Laing*."

(l) *Orne v. Cook*, 31 Ill. 238; *McCarty v. Kyle*, 4 Coldw. 354; *Nangle v. Smith*, 1 Irish Eq. 119; *Brooks v. Dent*, 1 Md. Ch. Dec. 530; *Farmer v. Simpson*, 6 Tex. 307; *Barickman v. Kuykendall*, 6 Blackf. 22; *Jackson d. Garnsey v. Livingston*, 7 Wend. 139; *Passaic Man. Co. v. Hoffman*, 3 Daly, 519; *Grayson v. Bannon*, 8 Watts, 528; *Reid v. Kenworthy*, 25 Kan. 703; see U. S. Dig., first series, p. 556 *et seq.* The general doctrine that the contents of a lost instrument can be proved by parol is too wide a subject to be taken up at length; one who desires to make a special study of it will find authorities collected in the following books: *Chitty's Stat.* (3d ed.) p. 14, n. (a); 1 *Chitt. Eq. Dig.* p. 432 (vii.) p. 666, pl. 12; 3 *id.* p. 2154; 13 *Vin. Abr.*, p. 104, n. (a); 9 *Peters. Abr.* (Am. ed.), p. 162 *et seq.*; *Waterman U. S. Dig.* p. 217, § 241; *Nott. & H. Ct. of Cl. Dig.*, p. 152; *Rose's Ark. Dig.*, pp. 320-1, pp. 524-6, *et seq.*; *Gen. Stat. Color.*, 1877, § 1085; *Code Civ. Proc. Cal.*, § 632; (*Amend. to Code*, p. 57); *Morrison's N. H. Dig.*, pp. 355-7.

(m) *Fitzgerald v. Adams*, 9 Ga. 474.

be proved like any other private instrument. If it cannot be produced, it must be shown, first, to have existed, next, that it is lost, which may be inferred from diligent but unsuccessful search for it in the place where, if still existing, it ought to be found; and then its contents may be proved by any person, having knowledge of them, with the same effect as the paper itself would have if produced.”(n) The proof of a lost deed does not give rise to greater danger of perjury than any other case where the contents of a lost instrument are shown by oral evidence.(o) That the writing has been lost, was said, in an Arkansas case, to be an additional reason for the interposition of chancery, in a case proper, for specific performance.(p) Oral evidence of the contents of a lost deed is admissible under the Statute of Frauds.(q) So in the case of a title bond.(r) And specific performance will be decreed, if necessary, where the deed has been lost.(s) A deed of marriage settlement, lost, may be proved by parol.(t) Where a contract of marriage settlement was sought to be made out from a lost correspondence, the language of the latter, showing the offer and its distinct acceptance, must be proved; and the recollection of its purport merely is not enough.(u) So a lost declaration of trust.(v) So a lost power of attorney; and the admissions of the constituent are admissible; the court held that this is no violation of the rule that the fee in land cannot be divested by parol.(w) The proof in the case of a lost instrument must be clear and definite.(x) Where a woman married on the faith of an antenuptial written promise, to make a

(n) *Irwin v. Irwin*, 34 Pa. St. 529.(o) *Blackburn v. Blackburn*, 8 Ohio, 82; see *Slate v. Eisenmeyer* 94 Ill. 97.(p) *Wiley v. Mullins*, 22 Ark. 394. Where there was a parol agreement by which a child was to farm land and support his parents, and the father agreed to devise the land, and made a will doing so, which will was lost; it was held, on parol proof of contents of the will, that the contract could be specifically enforced as a written contract of a decedent under a certain act allow-ing this remedy, the will being the writing; *Brinker v. Brinker*, 7 Pa. St. 55; act of Feb. 24, 1834, § 15, P. L. 75.(q) *Blackburn v. Blackburn*, 8 Ohio, 82; *Hunter v. Simrall*, 5 Litt. 65.(r) *Vardeman v. Lawson*, 17 Tex. 15.(s) *McCain v. Hill*, 2 Ired. Eq. 176.(t) *Potts v. Cogdell*, 1 Des. 454.(u) *Elwell v. Walker*, 52 Ia. 262.(v) *Bent v. Smith*, 22 N. J. Eq. 560.(w) *Jackson v. Livingston*, 7 Wend. 139.(x) *Ballingall v. Bradley*, 16 Ill. 379.

certain provision for her, this promise will be enforced against the promissor's estate, who died without making the provision, although the best proof of the promise procurable was verbal testimony of the contents of the written promise by persons who had read it; it being shown that the widow's luggage had been destroyed in a storm, and that it was assumed, on the testimony of the witnesses of the lady's habit of carrying the letter about, that the letters were in her luggage on the occasion of the storm.(y) *Semble*, the existence and loss of a deed are preliminary matter for the court, the contents are for the jury, and the interpretation of the latter are for the court.(z) An agent, in Pennsylvania, cannot prove that he had written authority to sell land, which was mislaid, and then prove its contents by parol; a third party only can do this.(a) After notice to the defendant, to produce a book said to contain a written memorandum of the contract, and a failure of the defendant to do so, parol proof of the mere fact of an entry, not showing what the entry was, will not satisfy the Statute of Frauds.(b)

§ 327. It being established that the form of the writing is immaterial, the following examples will show how this rule has been applied. A bill of parcels may be a sufficient note.(c) But not where invoices are mere memoranda.(d)

Example of
memo-
randa.
Bills of
parcels.

(y) *Gilchrist v. Herbert*, 26 L. T. N. S. 381.

(z) *Blackburn v. Blackburn*, 8 Ohio, 82.

(a) *Nicholson v. Mifflin*, 2 Dall. 246.

(b) *Falls v. Miller*, 2 Cr. & Dix, 416; Ir. Cir. Rep., 605. The fact of the proof of Lord St. Leonard's lost will by the oral testimony of his daughter, must be fresh in every lawyer's recollection.

(c) *Oliver v. Dix*, 1 Dev. & Bat. Eq. 165; *Fall River Whaling Co. v. Borden*, 10 Cushing, 474; *Batturs v. Sellers*, 5 Har. & John. 118.

(d) *Coats v. Chaplin*, 3 Q. B. 489; *Richards v. Porter*, 6 B. & C. 437. As to orders for goods being valid writings

under Scottish statutes, see *Douglas v. Grierson*, Morr. Dec. 11116; *Chalmers v. Walker*, Sess. Cas., 4th ser., vol. vi. p. 201; *North Brit. R. W. v. Sligo*, Sess. Cas., 4th ser., vol. i. p. 315. Where the plaintiff hiring out sacks as part of his business, sends a complete contract in a blank form, beginning with his own name, and leaving blank the number of sacks, and this the defendant filled up and signed, it was held that this was a sufficient writing to come within a certain statute of limitations applying to written contracts: *Chisholm v. Robertson*, Sess. Cas., 4th ser., vol. x. p. 760.

§ 328. A letter is sufficient.^(e) As, for example, a letter addressed to the person who afterwards became the writer's wife, is sufficient evidence of an ante-nuptial parol contract set out therein.^(f) So a letter from a father to a son about to marry.^(g) So a letter containing a guaranty written by one who had endorsed a note before the payee, and who in Pennsylvania could not without the letter have been held liable by the payee.^(h) A letter addressed to a friend of the plaintiff is sufficient, though it was in answer to a letter which the friend wrote the defendant without the plaintiff's knowledge.⁽ⁱ⁾ So, generally, letters addressed to third parties.^(j)

Letters.

§ 329. A receipt may be a sufficient memorandum;^(k) as for the price, or part of the price of land, if the contract is described in the writing.^(l) See as to promissory note for the price. And this though the receipt was not

Receipts.

(e) *Buckhouse (or Backhouse) v. Crosby*, 2 Eq. Cas. Abr. 32, pl. 44; *O'Hara v. O'Neil*, 7 Bro. P. C. 227; *Forster v. Hale*, 5 Ves., Jr., 313; *Coles v. Trecothick*, 9 Ves., Jr., 242; *Huddleston v. Briscoe*, 11 Ves. 591; *Boys v. Ayerst*, 6 Madd. 324; *Alt v. Alt*, 4 Giff. 84; *Kennedy v. Lee*, 3 Mer. 451; *Crofton v. Ormsby*, 2 Sch. & Lef. 590; *Nesham v. Selby*, 41 L. J. Ch. 551; 7 L. R. Ch., 407; *Clark v. Waddell*, 16 U. C. Q. B. 352; *Evans v. Miller*, 1 Ken. L. J. & R. 830; *Stoddert v. Bowie*, 5 Md. 33; *Brooks v. Dent*, 1 Md. Ch. Dec. 530; *Foster v. Leeper*, 29 Ga. 297; *Sherburne v. Shaw*, 1 N. H. 159; *Lang v. Henry*, 54 N. H. 59; *Scudder v. Wade*, 1 Southard, 249; *Steere v. Steere*, 5 Johns. Ch. 12; *New York, etc., R. R. v. Pixley*, 19 Barb. 428; *New Haven Co. v. Quintard*, 1 Sweeny, 102; *Lowry v. Mehaffy*, 10 Watts, 389; *Neufville v. Stuart*, 1 Hill's Ch. (So. Car.) 166; *Sains v. Fripp*, 10 Rich. Eq. 459, and see the present chapter generally.

(f) *Kinnard v. Daniel*, 13 B. Mon. 499.

(g) *Caborne v. Godfrey*, 3 Des. 520.

(h) *Eilbert v. Finkbeiner*, 68 Penn. St. 247.

(i) *Moore v. Hart*, 1 Vern. 114.

(j) *Moss v. Atkinson*, 44 Cal. 16; *Moore v. Mountcastle*, 61 Mo. 426.

(k) *Bryant v. Crosby*, 40 Me. 10; *Reynolds v. O'Neill*, 11 C. E. Green, 225; *Franklin v. Long*, 7 G. & J. 407; *Raubitschek v. Blank*, 80 N. Y. 481; *Evans v. Evans*, 29 Pa. St. 280; *Ross v. Baker*, 72 Pa. St. 189; *Penna. Ins. Co. v. Dougherty*, 13 W. N. Cas. 272 (S. C. Pa.); *McWilliams v. Lawless*, 17 N. W. Rep. 349 (S. C. Neb.); *Eppich v. Clifford*, 6 Col. 493.

(l) *Keys v. Goldsborough*, 2 H. & J. 371; *Welsh v. Bayaud*, 21 N. J. Eq. 186; *Barickman v. Kuykendall*, 6 Blackf. 22; *Devine v. Griffin*, 4 Grant (Can.), 606; *Richards v. Nolan*, 3 Martin, N. S. 338; see *Cosack v. Descoudres*, 1 McCord, 425, for a receipt held sufficient; *Fulton v. Robinson*, 55 Tex. 404.

designed to be anything more than evidence that the money had been paid.(m) A receipt in satisfaction of all demands is good as evidence of the accord, and satisfaction of an equitable title in land.(n)

§ 330. A debt included in an account stated may be recovered on, notwithstanding the consideration was a promise within the Statute of Frauds.(o) In a *dictum*, in a Canada case, it was said that a plaintiff may recover upon satisfactory evidence of an account stated without producing any written evidence of the alleged contract for the sale of the land, if it was clear that the contract had been executed and a balance plainly admitted to be still due.(p) The Statute of Frauds would not be violated by holding that, if the liability was one upon which an account could be stated, the account stated could be made the subject of recovery in this action; for the Statute of Frauds does not apply to accounts stated, or to implied promises; and if the liability was one which could support an account stated, since the Statute did not extinguish or annul the liability, but only prohibited an action upon it without written proof; and since written proof is not necessary for establishing an account stated, the plaintiff might have recovered in this action, not-

(m) *Connell v. Mulligan*, 13 Sm. & M. 390, citing *Parkhurst v. Van Cortlandt*.

(n) *Grumley v. Webb*, 48 Mo. 577.

(o) The court, speaking of the cause of action, said: And we think it sustainable also on principle; for, after the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand; that it is a debt which he is morally, if not legally, bound to pay, and which therefore forms a good consideration for a new promise; and the creditor, on the other hand, may reasonably be excused for not preserving the evidence which would have been necessary to

prove the original debt before such admission. The principle may not, perhaps, be applicable to cases where it can be shown the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as by those against usury or gaming; but we think it applies to cases where the only objection is, that the original debt might not have been recoverable from the deficiency of legal evidence to support it; *Cocking v. Ward*, 1 C. B. 867 (citing cases).

(p) *Curtis v. Flindall*, 3 U. C. K. B. 324, citing *Knowles v. Michel*, 13 East, 250; *Dynes v. O'Neill*, 1 Cr. & D. 329; *Seago v. Deane*, 4 Bingh. 459, and other cases.

withstanding the Statute of Frauds.(q) It has been stated that a collateral liability, such as a guaranty, cannot be the subject of an account stated.(r) Where the plaintiff agreed to balance the account of one D., whose debt the defendant answered for, and settle the account in his, the plaintiff's, book on the basis of the defendant's guaranty, and did so balance the account; this was a circumstance to show that D. was not looked to or was discharged, and that therefore the Statute of Frauds did not apply.(s) That a memorandum was drawn up to state an account does not the less make it effectual as evidence of a contract, which it describes so as to satisfy the Statute of Frauds.(t) Where one bought as agent, an account signed by him, addressed to the plaintiff, is a sufficient memorandum to establish a trust in the agent for the plaintiff.(u) In Maryland it has been said that a stated account must be shown to be in writing, but that it need not be signed; acquiescence is enough.(v) An account stated, but not in compliance with the Statute of Frauds, and under an earlier portion only of the contract in suit, is not sufficient.(w)

§ 331. An I. O. U., though it did not state that it was for an antecedent debt, was held to be sufficient evidence of a promise to pay a certain sum upon a marriage; part of the sum having been paid, and

Promissory
note.

(q) *Wilson v. Marshall*, 2 Ir. Rep., C. L. 360, citing *Cocking v. Ward*, and several other cases.

(r) *Wilson v. Marshall*, 2 Ir. Rep., C. L. 360. Under the Scotch law striking a balance upon an account stated, and giving a written promise to pay such balance is (*semble*) not a sufficient memorandum of guaranty; *Dunmore Coal Co. v. Young*, 16 Fac. Dec. 174.

(s) *Cooper v. Wait*, 8 N. Y. Week. Dig. (S. C. N. Y.) 367.

In an action on a written promise to deliver to the plaintiff a certain quantity of wool, the defence set up was this contract was done away with by a later one, and the evidence to support the defence was a receipt dated nearly three years after the first paper, and

which recited the receipt of a certain sum of money, and stated that certain crops, *inter alia*, had been delivered by one M. to the plaintiff. M. was the principal under the earlier contract, and the defendant's testator surety therein; and there was evidence that the plaintiff, after the receipt had been given, had stated that he had got his pay from M. It was held that the defence was made out, the receipt being good evidence under the Statute of Frauds; *Bryant v. Crosby*, 49 Me. 10.

(t) *Barry v. Coombe*, 1 Peters, 651.

(u) *Denton v. M'Kenzie*, 1 Desaus. 297.

(v) *Wood v. Gault*, 2 Md. Ch. 433.

(w) *Falmouth (Earl of) v. Thomas*, 1 Cr. & M. 106; 3 Tyr., 26.

the I. O. U. given the day of the marriage.(x) The delivery and acceptance of a promissory note for the balance due on an account stated satisfies the Statute of Frauds.(y) A promissory note complies with the Statute.(z) *Seem*, that where the vendor of land sues, he being bound by bringing the action, the vendee is bound by a promissory note given by him for the price.(a) So the endorsement of a note.(b) But in a case in Alabama a promissory note for the price of land was held to be an insufficient memorandum, as not setting forth the contract. See above as to a receipt for the price.(c) Where the promissory note is for part only of the consideration, as where it is agreed that for a chattel a certain other chattel shall be given, and an additional sum secured by a note, the latter does not evidence the entire contract to satisfy the Statute of Frauds.(d) A memorandum in the form of an order is sufficient under the Statute.(e) Under the Scotch law an I. O. U. is *in re mercatoria*, and valid proof of items of a mercantile account for which it was given.(f)

§ 332. A will may be a sufficient note in writing: as where a donor in his will referred to his daughter's having been provided for on the day of her marriage, and the alleged gift of land under which the daughter had partly performed was made by parol on the day in question.(g) *Seem*, also, that a will made by the defendant, the obligor, under a parol antenuptial promise, which will was read to the plaintiff, and contained a devise in accordance with the promise, is

(x) *O'Sullivan v. O'Callaghan*, 2 Ir. Jur. 314; see *Wright v. Wright*, 54 N. Y. 440.

(y) *Armstrong v. Cushney*, 43 Barb. 341.

(z) *Wright v. Wright*, 54 N. Y. 440; *Mowry v. Wood*, 12 Wis. 427; *Phillips v. Ocmulgee Mills*, 55 Ga. 636.

(a) *Gillespie v. Battle*, 15 Ala. 279.

(b) *Turnbull v. Trout*, 1 Hall, 340; *Allen v. Pryor*, 3 A. K. Marsh. 306.

The president and the agent of a company, signing with their titles, executed a note to the effect that the company would pay a certain sum of

money. The defendants signed below signatures of the president and of the agent on the face of the note; it was held that they should be treated as sureties, no special form for such a promise being required by the Statute of Frauds; *Parks v. Brinkerhoff*, 2 Hill (N. Y.), 663.

(c) *Bates v. Terrell*, 7 Ala. 134.

(d) *Combs v. Bateman*, 10 Barb. 575.

(e) *Lerned v. Wannemacher*, 9 Allen, 416.

(f) *Bowe v. Hutchison*, Sess. Cas. 6 M. 646; 40 Scotch Jur., 326.

(g) *Hart v. Hart*, 3 Des. 595.

sufficient under the Statute.(h) So a will executed but lost,(i) or imperfect as such.(j) The last two cases were also those where the defendant's promise was to make a certain devise. An oral contract of services, fulfilled for a series of years, in consideration of a devise of land, will support such a devise, though the will made and delivered to the plaintiff, the testator's son, was invalid as such on other grounds.(k) But a will to satisfy the Statute of Frauds must contain the whole contract.(l) Where an oral antenuptial contract provided that the wife should dispose of her property as she pleased, and the husband's right should be given up, and by a mistake this contract was evidenced on her part by a will, instead of a deed, and the marriage took place, revoking the will, it was held that in equity the mistake would be corrected, and the contract enforced.(m)

§ 333. The execution of a bond of arbitration is sufficient.(n) So a reference in partition.(o) Where an executor puts down in the inventory of the estate the land which he, the executor, was to have conveyed to his testator, and signs the inventory, after stating in the writing that he was bound by contract to convey, the statute

Arbitration and record evidence generally.

(h) *Argenbright v. Campbell*, 3 Hen. & Mun. 159.

(i) *Wiley v. Mullins*, 22 Ark. 394.

There was evidence upon the trial showing that after Melton and wife, the claimants, went into the possession of the lands described in the complaint, Mrs. Gilmore executed a will disposing of her entire estate, and tending to show that by such will she devised and bequeathed at least the greater portion of her property, including said lands, to Mrs. Melton, and the will was lost, but *semble* that the evidence satisfied the Statute of Frauds; *Mauck v. Melton*, 64 Ind. 415.

(j) *Maddox v. Rowe*, 23 Ga. 433.

(k) *Hiatt v. Williams*, 72 Mo. 215.

(l) *Archer v. Scott*, 17 Grant, 249.

Where a testator made a will providing for his children in a certain way, but adding the condition that if

the children by a first wife were to enjoy his, devisee's, bequests they must convey to the uses of his will certain land which they held in their own right from their mother; the will was communicated to the children, and a deed was made by them to their father of their land, and in the deed the will was recited. It was held that, after the acceptance of this deed, the father could not diminish the interest which in his will he had given to his children; the will so far ceased to be ambulatory; *Gilpin v. Scovil*, 1 Hann. (N. B.), 399, citing cases.

(m) *Lant's Appeal*, 95 Pa. St. 279.

(n) *Cooth v. Jackson*, 6 Ves., Jr. 12 (*semble*); for an agreement stated in an order of court, see *Evans v. Miller*, 1 Kent. L. J. and Rep. 830.

(o) *Trice v. Pratt*, 1 Dev. & Bat. Eq. 628.

is satisfied.(p) Where a railway having occasion to take land serves the owner in due form with a notice to treat, the relation of vendor and purchaser is thus created, and it only remains to ascertain the price; and the owner having served the company with his offer, and nothing further is done by the company, a right of action for the price named in his offer lies on the part of the owner.(q) A recognizance for stay of execution, invalid as such for not complying with certain statutory requirements, may be good, however, as a written guaranty.(r) A cognizance in a criminal proceeding, taken in open court and entered in the order book, is valid without either the seals or signatures of the cognizers; the Statute of Frauds does not apply.(s) Where a corporation was taking land for its public purpose, and had filed the statement required by statute under the circumstances, and then had made a special agreement with the land-owner, which, without being signed, was entered on the record, it was held that the Statute was satisfied, record evidence being the best possible.(t) Where permission was given in the lease to the lessee to extend a wharf, the sanction of the city within which the wharf was situated being first obtained, compliance with this requirement was sufficiently shown by evidence of the records of the city, and this though a statute of the state required written assent by an applicant for a city ordinance, and this assent was not put into writing, the applicant having, in fact, extended his wharf.(u)

§ 334. A case stated is sufficient proof of a fact, and it cannot afterwards be objected that there was no written evidence of it.(v) It has been stated that while a

Case
stated;
affidavit.

(p) *Farrar v. Patton*, 20 Mo. 84.

(q) *Eaton v. Mid. R'way*, 10 Ir. Law Rep. 314. Where one S. L. had undisputed title to the *locus in quo*, and the plaintiff's husband had received a patent of the land from the state, as land that had belonged to the sinking fund, evidence of the official list of land belonging to the commissioner of the sinking fund, in which the land in question was noted as "acquired from L." (*i. e.*, S. L.), "and sold to Kerr,"

was admissible to show the plaintiff's title; *Kerr v. Farish*, 52 Miss. 104.

(r) *Duckwall v. Rogers*, 15 Ohio St. 546.

(s) *Grinestaff v. The State*, 53 Ind. 240, citing cases.

(t) *Huston v. Cincinnati R. R.*, 21 Ohio St. 236.

(u) *Baltimore (City of) v. White*, 2 Gill, 457.

(v) *Swatara R. R. v. Brune*, 6 Gill, 48 (a case not turning on the Statute of Frauds).

case stated is not a memoradum under the Statute of Frauds, it is, *semble*, an admission.(w) An affidavit is a sufficient writing.(x) Where in a previous collateral proceeding the plaintiff in the principal case had made affidavit that the present defendant was not a man of property, because he had refused to give a marriage portion to his daughter, whom the affiant had married, and the present defendant, by a counter-affidavit, had denied this statement, and asserted that at the marriage he had said, "There will be no money for you now, but at my death she," the daughter, "shall share with the rest of my children," it was held that the latter affidavit was entitled to special consideration,(y) and *semble* it must have been signed to be valid.

§ 335. A statement in a bill in equity of a willingness to assume encumbrance on certain land is sufficient.(z)

An answer in equity is a sufficient memorandum.(a)

Answer in equity, and pleading generally.

And where, in another proceeding, an answer sets up a guaranty as a defence to a suit by a creditor claiming a fund, the guarantor who received the fund as a consideration for the guaranty is bound as by a sufficient note under the Statute of Frauds.(b) A contract relating to a partnership in realty may be shown by the recitals in a bill and answer in a suit in equity relating thereto.(c) An answer in equity admitting the contract does not bind if the Statute of Frauds is at the same time set up; see Pleading.(d) A bill in

(w) *Reeves v. Pye*, 1 Cranch, C. C. 219.

(x) *Scott v. Avery* (Dom. Proc.), 20 Monthly Law Reporter; Fell on Guar., p. 61, n. (a case resembling *Barkworth v. Young*).

(y) *Barkworth v. Young*, 4 Drew, 9; 26 L. J. Ch. 153; see *Smith v. Arnold*, 5 Mason, 417.

(z) *Ives v. Hazard*, 4 R. I. 14; see *Aiken v. Ferry*, 6 Sawyer, 90.

(a) *Packard v. Putnam*, 57 N. H. 50.

(b) *Mills v. Mills*, 3 Head, 710.

(c) *Collins v. Decker*, 70 Me. 23.

(d) *Jackson v. Oglander*, 2 H. & M. 472.

In a suit claiming that the defendant held land only as joint owner with the plaintiff, and not in severalty, the court said if the parol evidence of the joint purchase needed any confirmation it is put beyond all doubt by a petition for partition, filed by the defendant against the plaintiff, in which the plaintiff is stated to be the owner of two undivided two-thirds parts of the land, and the petitioner of the other third, and by a written agreement between the said defendant and the plaintiff, and an

equity filed in the principal case may act as a memorandum, as where it binds the plaintiff, and prevents the objection being raised that is a want of mutuality under the contract; see Chapter XIII.(e) And where the pleadings being uncontradicted they may supplement or supply the place of the memorandum required by the Statute; see Pleading.(f) Where the answer to a bill for specific performance acknowledges the receipt of fines for a lease and readiness at one time to lease, and refers to a written memorandum, which states the contract, the Statute of Frauds is satisfied.(g) Where two persons, contemplating marriage, agree that the woman shall have her property settled upon herself, and after marriage a bill is brought by the wife asking for the settlement, and the husband in his answer admits the agreement, and a deed is afterwards executed by the wife, but not properly acknowledged so as to bind, the deed carries out the oral agreement, and reserves to the wife a power to will; she afterwards makes a will, containing certain devises and bequests to her husband; the latter brings a bill against the heirs and (*semble*) next of kin of the wife; it was held that the pleadings in the suit brought by the wife against the husband were not proof of the oral antenuptial contract by which the deed was sought to be supported.(h) It has been held that a bill in equity for specific performance brought by the defendant below was not a sufficient memorandum to comply with the Statute of Frauds, so as to be evidence for the plaintiff below, who sued to recover for a deficiency of price on the resale of the land claimed to have been bought by the defendant, refused by him, and then resold. The bill was admitted to be a full statement of the contract of sale, and if admissible would have been sufficient, but unsworn to was regarded as merely suggestions of counsel.(i) In Lower Canada in commercial cases answers to in-

award thereupon by persons chosen for that purpose, providing for the temporary occupation of the land until a final partition should be made; Trice v. Pratt, 1 Dev. & Bat. Eq. 628.

(e) Ivory v. Murphy, 36 Mo. 539.

(f) King v. Ruckman, 21 N. Y. Eq. 599.

(g) Hartley v. Wilkinson, 1 Ir. Term (Ridgw., L. & S.), 357.

(h) Lassence v. Tierney, 1 Mac. & G. 570.

(i) Adams v. McMillan, 7 Porter, 80, citing cases as to weight of a bill as evidence in another suit.

Where a plaintiff had obtained a de-

terrogatories *sur faits et articles* or refusal to answer is equivalent to the memorandum required by the Statute of Frauds; this right is saved by 12 Vict. c. 38.(j)

§ 336. The memorandum under the Statute of Frauds does not require a seal.(k) The rule applied to a stipulation of defeasance under a contract relating to personalty.(l) A contract may be evidenced by a specialty;(m) as a bond given before marriage engaging the obligor to make a certain marriage settlement,(n) or a title-bond, which is a covenant by the vendor of land to make a good title in the land to the vendee when the purchase-money is paid.(o) And such a bond engaging absolutely to make title to land binds as an admission that the sale has been made, and need not therefore show the terms of the contract.(p) A seal is not essential even to a memorandum of sale of land.(q) A memorandum of a contract relating to

Memo-
randa
under seal
and deed
generally.
Title-bond.

cree for specific performance upon his bill and the admissions in the answer, but which decree provided that if the complainant did not make a certain payment his bill should be dismissed, Lord Eldon decided as between the heirs-at-law of the plaintiff and devisees claiming under a will made by the latter, between the time of the action brought and the decree made, that the plaintiff having had the option of having his bill dismissed at any time prior to the actual payment of the money, the equitable title vested in him at the latter date and not before; *Gaskarth v. Lowther*, 12 Ves. 107; in the case immediately before the court the defendant in the previous suit was plaintiff, coming in with a bill of revivor; as he was ready to convey, the only question was on the respective rights of the devisees and heirs of the other party.

(j) *Levey v. Sponza*, 6 Low. Can. Jur. 185, Q. B. In another case it was doubted whether a *commencement de preuve par écrit* was sufficient, and,

semble, that answers *viva voce* to interrogatories, *sur faits et articles*, are insufficient.

(k) *Wheeler v. Newton*, Prec. Ch. 16; 2 Eq. Ca. Ab. 44; *Moore v. Hart*, 1 Vern. 114 (see note citing cases); *Morgan v. Overman Mining Co.*, 37 Cal. 537; *Minor v. Willoughby*, 3 Minn. 233; *Farris v. Martin*, 10 Humph. 495; *Worrall v. Munn*, 1 Seld. 239; *Cadwalader v. App*, 81 Pa. St. 210; *Holman v. Criswell*, 13 Tex. 44; *McFarson's Appeal*, 11 Pa. St. 503.

(l) *Adams v. Power*, 52 Miss. 833.

(m) *Jenkins v. Harrison*, 66 Ala. 355; *Kershaw v. Kershaw*, 102 Ill. 311.

(n) *Cannel v. Buckle*, 2 P. Wms. 243.

(o) *Vardeman v. Lawson*, 17 Tex. 15.

(p) *Holman v. Bank of Norfolk*, 12 Ala. 369.

(q) *Owen v. Frink*, 24 Cal. 175; *Olmead v. Niles*, 7 N. H. 526; *Martin v. Weyman*, 26 Tex. 466; *McFarson's Appeal*, 11 Pa. St. 503; *Woods v. Wallace*, 22 Pa. St. 176; *Simmons v. Spruil*, 3 Jones's Eq. 9.

land need not be witnessed or acknowledged.(r) A title-bond may be assigned by an unsealed writing.(s) The contract need not be under seal, but whether it is or not its effect is to pass an equitable title;(t) the equitable title under a title-bond passes when the money is paid.(u) And while this probably would be the rule generally, and the mere addition of a seal to a contract of sale would not suffice to pass the legal title without suitable words of demise, the ordinary case is that of simple contracts, which are held to raise an equitable title in land, so that, for example, such a vendee is an "owner" within the meaning of other statutes.(v) And however necessary a seal may be to create a title cognizable at law, chancery makes no such requirement.(w) An unsealed writing, while it has no effect as a conveyance, is sufficient as a memorandum under the Statute of Frauds.(x) In Louisiana it is held that between the parties thereto, an act under private signature is as valid as a notarial act; the difference is in the manner of proof.(y) An agreement allowing the erection of a party-wall by a vendee, and engaging to require vendees of adjoining premises belonging to the same owner to pay compensation for use of the wall, is sufficient without a seal.(z) A mortgage of land may be made by simple writing.(a) So the sale of a possessory interest in land.(b) A corporation can contract for the sale of land by a memorandum not under their corporate seal.(c)

§ 337. An insufficient deed may be good as a memorandum.(d) The rule is the same in equity.(e) An undelivered

(r) *Missouri Valley Co. v. Bushnell*, 11 Neb. 196.

(z) *Platt v. Eggleston*, 20 Ohio St. 419.

(s) *Holman v. Criswell*, 13 Tex. 44 (citing *Durst v. Swift*; *Worrall v. Munn*).

(a) *Woods v. Wallace*, 22 Pa. St. 176.

(b) *Clark v. Gellerson*, 20 Me. 18.

(t) *Martin v. Weyman*, 26 Tex. 466; *Patterson v. Buffalo*, 17 Grant, 523.

(c) (*Congregation of*) *Beth-Elohim v. Central Presbyterian Church*, 10 Abb. Pr., N. S. 487; *Banks v. Poitiaux*, 3 Rand. 143.

(u) *Vardeman v. Lawson*, *supra*.

(v) *Cowen v. Phillips*, 33 Beav. 18.

(w) *McCaleb v. Pradat*, 25 Miss. 257.

(d) *Miller v. Alexander*, 8 Tex. 43;

(x) *Owen v. Frink*, 24 Cal. 175.

Ledbetter v. Walker, 31 Ala. 176;

(y) *Bradford v. Clark*, 7 La. 151.

Somerville v. Trueman, 4 Harr. & Me-

(e) *Hanson v. Michelson*, 19 Wis. 508; *Ing v. Brown*, 3 Md. Ch. 525.

deed may, as has been said, answer this purpose; (f) or a deed made by an agent with authority to contract, but not to convey; see *infra*. (g) A deed defective as such may be good as a license. (h) In an action on a written promise to pay for the use of certain land, defective leases, though they pass no title, are admissible on behalf of the plaintiff to show how the defendant held the land. (i) Under the civil law an authentic act, if it has not the officer's signature, does not prove itself, but if properly proved is good as a private writing. (j) A release, invalid for want of a seal, is good as an agreement not to claim any interest in the land, and should be stamped as such. (k) The doubt whether an unstamped paper can be used as a memorandum, under the Statute of Frauds, raises the further question of the policy of the revenue laws. (l) Where the deed recites the terms of the contract, as such, there can be little question but that the Statute of Frauds is satisfied. (m) So where the deed recited that the assumption, by the vendees of land, of certain notes for the price given by their vendor to the original owner, and secured by mortgage on the land, the recital is evidence of the liability of the last vendee to pay the notes. (n) The recitals in a post-nuptial settlement of an ante-

Deed as a memorandum; insufficient deed; undelivered deed.

Hen. 62; Williams v. Sprigg, 6 Ohio St. 591; Wright v. Lancaster, 48 Tex. 255; Kingsbury v. Burnside, 58 Ill. 335-6; Dutton v. Warschauer, 21 Cal. 623; Dugat v. Comeau, 5 Robinson, 477; Slack v. Black, 109 Mass. 499; the point adverted to but not decided.

(f) Wood v. Davis, 82 Ill. 312; but see §§ 338, 388; and see Freeland v. Charnley, 80 Ind. 139.

(g) Jones v. Marks, 47 Cal. 248; Groff v. Ramsey, 19 Minn. 50; citing cases, and holding that an equitable title will pass; but, in Alabama, in equity only; see Morrow v. Higgins, 29 Ala. 450.

(h) Floyd v. Ricks, 14 Ark. 295.

(i) Cornwall v. Hoyt, 7 Conn. 428.

(j) Andrews v. Marshall, 26 Tex. 216; Hood v. Seagrest, 12 Robin. 214.

(k) Rex v. Ridgwell, 6 B. & C. 669; 9 D. & R. 678.

(l) See Evans v. Prothero, 21 L. J. Ch. 772; 20 L. J. Ch. 448, for opposite opinions entertained on the point by Lords Truro and Cottenham.

(m) Brown v. Frantum, 6 La. 46; see Kelley v. Stanbery, 13 Ohio, 408.

(n) Cushman v. Garrison, 2 Cincin. Super. 146. Where several owners agreed verbally that the houses they put up should be used only as dwellings, and each inserted the restrictions in the deeds he gave; any purchaser can set up this against any other purchaser, and the Statute of Frauds is satisfied by the restrictions in the original grants; Parker v. Nightingale, 6 Allen, 346.

nuptial parol agreement do not receive the credit usually given to this kind of evidence, because of the danger of fraud upon creditors of the husband; see *Marriage*.(o) Where a deed and memorandum are made at the same time, for the same price by the same parties, and concerning the same subject-matter, the two may be taken together, though neither refers to the other; see *infra*, § 351 *et seq.*(p)

§ 338. Where, however, the deed does not evidence the contract further than by conveying the subject-matter thereof, the rule is that the deed is not a memorandum under the Statute, because its office is not to furnish evidence of the agreement, and in fact in many, if not in most cases, does not do so fully. A deed is the fulfilment of the contract, not the evidence of it.(g) A deed does not evidence the whole contract, and is not intended to be a memorandum of it.(r) In another case it was said, that "the deed is evidence of the final consummation of some contract previously made, but it is not evidence of what the contract was, and has nothing to do with it further than to carry it out."(s) Especially is this the case where the provisions of the deed differ from the contract sought to be enforced, as where the deed reserved a cash price, and the contract as admitted was upon credit.(t) Where, under an oral contract of sale, the vendor promised to repair after conveyance, the vendee can sue on this promise, the deed not being exclusive evidence of the contract.(u) Rent-rolls, particulars of estates, abstracts, etc., delivered by the vendor to the purchaser, will not be considered an agreement although signed by him, and containing the particulars of the agreement.(v) The rule works both ways, and where the memo-

Deed
ordinarily
the fulfil-
ment not
the evi-
dence of
the con-
tract.

(o) *Jones v. Henry*, 3 Littell, 433.

(p) *Thayer v. Luce*, 22 Ohio St. 74.

(q) *Frazer v. Buder*, 3 L. & Eq. Rep. 622, S. C. Iowa, Oct. Term, 1876, where the suit was to enforce a term of the contract not given in the deed; *Greedy v. McGee*, 55 Ia. 760.

(r) *Thomas v. Sowards*, 25 Wis. 635; see *Temple v. Johnson*, 71 Ill. 16, where the deed was made to another

person than the plaintiff, and an incidental allusion was sought to be twisted into a contract; see *Odell v. Montross*, 68 N. Y. 502.

(s) *Trayer v. Reeder*, 45 Iowa, 273.

(t) *Campbell v. Thomas*, 42 Wis. 448.

(u) *Manning v. Jones*, 1 Busb. 368.

(v) *Parrish v. Koons*, 1 Pars. Eq. Ca. 84; citing *Sugden on Vendors*.

randum fully states the contract the execution of a subsequent deed, not containing all the terms of the agreement, will not invalidate the memorandum; as where a lease was sold and the memorandum stated that the vendor of the lease should pay a sum demanded by the lessor for his consent to the assignment, and the deed was made transferring the lease, but not reciting this stipulation, it was held that the deed did not impeach the memorandum.(w) As to the necessity of delivery to make a deed effectual as a memorandum under the Statute, see *infra*, § 388.

§ 339. A telegram properly identified is equivalent to a letter, and is an adequate compliance with the Statute.(x) But a telegram must be proved like any Telegram. other writing.(y) The signature of the telegram by the operator binds the party sending the memorandum.(z) And a telegram issued on written and signed instructions is sufficient.(a) Sufficient memoranda, executed by the parties in the form of instructions for a telegram, are good under the Statute of Frauds, and the telegraphic copies are sufficient without producing the original instructions.(b) Although there has been some discussion in the cases as to whether the despatch sent to the office to be transmitted, or the despatch transmitted and received at its destination is the original, they all agree that a telegraphic despatch is a sufficient compliance with the Statute of Frauds in its requirement that a promise,

(w) *Carrigy v. Brock*, 5 Ir. Rep. C. L. 504.

(x) *McBlain v. Cross*, 25 L. T., N. S., 804; *Murphy v. Thompson*, 28 U. C. C. P. 233; *Coupland v. Arrowsmith*, 18 L. T., N. S., 755; *Dilworth v. Bostwick*, 1 Sweeny, 588; *Kinghorne v. Montreal Telegraph Co.*, 18 U. C. Q. B. 66; see *Centr. L. J.*, April 22, 1881.

(y) *Durkee v. Vt. C. R. R.*, 29 Vt. 140.

(z) *Dunning v. Roberts*, 35 Barb. 468.

(a) *Godwin v. Francis*, L. R. 5 C. P. 295 (and this though the telegram delivered had no signature strictly speak-

ing, but only the names of the sender and receiver written in the blanks of the form).

(b) *Bundy v. Johnson*, 6 U. C. C. P. 223, distinguishing *Moore v. Campbell*, 10 Exch. 323, as a case where it was doubtful whether the agreement did not call for a writing by both parties. See an article in 4 Am. Law Reg., N. S., 207-8, where it is said, that when the sender gives verbal instructions to the operator, and the message is written out with the sender's signature attached by the receiving operator, this last memorandum will satisfy the Statute of Frauds.

like that alleged in this case, should be in writing.(c) Whether a telegram constitutes a contract depends upon circumstances and the intention of the parties.(d) Apart from the Statute of Frauds, as well as thereunder, a telegraphic despatch is evidence of a contract.(e) A letter by mail accepting an offer by telegram is sufficient.(f) A negotiation opened by a letter, but continued and concluded by telegraph, is properly evidenced.(g) A contract of lease by the telegram is good.(h) And a letter and a telegram together may constitute a demise of lease.(i)

§ 340. How far an entry upon the books of a corporation is evidence under the Statute of Frauds of a contract made by the corporation is a point not clear of doubt. The tendency of the decisions is to hold the corporation upon such an entry, unless it appears that a further writing was intended, and the entry was not designed to have the effect reserved for the formal instrument. Thus, where a municipal council adopted a resolution declaring the plaintiff's newspaper the official one, and this was entered and signed by the clerk in the minutes, the evidence was sufficient.(j) So a vote recorded in the minutes of a corporation

Record of
corpora-
tion.

(c) *Smith v. Easton*, 54 Md. 138.

(d) *Beach v. R. R.*, 37 N. Y. 457.

(e) *Taylor v. The Steamboat Co.*, 20 Mo. 254.

(f) *Trevor v. Wood*, 36 N. Y. 307; *Godwin v. Francis*, *supra*.

(g) *Murphy v. Thompson*, 28 U. C. C. P. 233.

(h) *Calhoun v. Atchison*, 4 Bush, 261.

(i) *Prosser v. Henderson*, 20 U. C. Q. B. 440. An acceptance written and signed by the defendant, and then telegraphed and delivered to the plaintiff, is a sufficient written acceptance of a bill under the New York Statute. That a telegram is a sufficient memorandum under the Statute, see articles in 4 Am. Law Reg., N. S., 207, and 12 Centr. L. Jour. 366; see Statutes Ind. (1862), i. p. 612, and Scott & Jarnagin on Teleg.,

§ 334; see Index for Statutes in Indiana, California, and Oregon, providing expressly that contracts by telegram shall be deemed contracts in writing.

(j) *Argus Co. v. Mayor, etc.*, of Albany, 55 N. Y. 500 (the plaintiff filed a written acceptance of the resolution, but this, *semble*, did not affect the case; see a case relating to land, *Grimes v. Hamilton Co.*, 37 Iowa, 294.

In *Himrod v. Cleveland, etc.*, R. R., 22 Ohio St. 457, the defendant's directors at a meeting passed a resolution authorizing their superintendent to make a contract with the plaintiff; the resolution described the parties and all the terms of the contract. This resolution, together with a copy of a minute of the board, were signed by the secretary and given to the superin-

that the plaintiff was engaged as superintendent for a certain time, at a certain salary, is sufficient.^(k) A vote signed by the clerk is valid.^(l) Even as evidence on behalf of the same clerk suing for services.^(m) A letter to the plaintiff from the secretary of the corporation defendant, stating the former's appointment to a church for a year at a gross sum, together with a vote stating that the church did not owe anything to the plaintiff till a certain date, are sufficient.⁽ⁿ⁾ A few decisions holding the entries, etc., made in the records of the corporation to be insufficient memoranda appear to turn on the point that the memorandum was not intended as a contract, which was to be evidenced, if made at all, by some writing; the facts of each case are given below in the note.^(o)

tendent, who delivered them to the plaintiff, who accepted the terms; and this was held a sufficient memorandum to satisfy the Statute of Frauds; one judge dissented because the memorandum was not intended as a contract, but as authority merely to the superintendent, and the delivery was not of itself the contract which the superintendent was authorized to make; the dissenting judge thought the secretary's signature was only for authentication.

(k) *Tufts v. Plymouth Co.*, 14 Allen, 411; see *Chase v. Lowell*, 7 Gray, 35.

(l) *Chase v. Lowell*, 7 Gray, 35; *Johnson v. Ronald*, 4 Munf. 77; *Argus Co. v. Mayor, etc.*, of Albany, *supra*.

(m) *Chase v. Lowell*, *supra*.

(n) *Johnson v. Trinity Church*, 11 Allen, 123.

(o) In *Wade v. City of Newbern*, 77 N. Car. 460, a proposal to lease land to the defendant for more than three years was adopted by the latter, and entered on their minutes; a lease tendered by the plaintiff was accepted by the mayor, who was authorized to sign it and affix the defendant's seal thereto, neither of which things was done; it was held that there was no sufficient

memorandum under the Statute of Frauds (distinguishing *Laythoarp v. Bryant*, 2 Bing., N. C. 744). In *Flint v. Pierce*, 99 Mass. 69, the facts were as follows: By a by-law the members of a corporation did "pledge themselves in their individual as well as in their collective capacity" for all moneys lent the association, and the preamble of the same stated as one of the objects of the institution the saving of money and lending it to advantage; and the defendant signed the by-laws as required to do by law; and it was held that he was not personally responsible on a promissory note executed by the corporation, as the signature to the by-laws was not for the purpose of incurring such liability, but in order to become a member; and because by-laws are laws and not evidence of contract with strangers; *semble secus*, if the by-laws had been adopted for the purpose of gaining credit, and had been relied on by the plaintiff; citing *Trustees of Free Schools v. Flint*.

In *Dunham v. City of Boston*, 12 Allen, 376, the land commissioners being authorized to sell lands, subject to the approval of the mayor, recommended by written vote the sale of certain land

by deed at a certain price, etc., to the plaintiff; the mayor signed this vote; a deed was prepared but not delivered, and it was held that the city was not bound, the vote not being intended as a contract, or communicated to the plaintiff as such, and that a deed only was intended to bind. In *Wilmot v. (Corporation of) Coventry*, 1 Y. & Coll. Exch. 524, it was held that a corpora-

tion would not, in absence both of a contract under its seal and of any acts of part performance on the part of its obligee, be bound to give a mortgage to one who had lent it money; the only evidence of the contract being a minute in the corporation records stating the loan, and noting a direction that the mortgage in question should be prepared.

CHAPTER XIII.

THE NATURE OF THE MEMORANDUM—MEMORANDUM ON SEPARATE PAPERS.

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| <p>§ 341. Memorandum on different papers referring to each other.</p> <p>§ 342. Examples of memoranda sufficiently connected.</p> <p>§ 343. Examples of memoranda <i>not</i> sufficiently connected.</p> <p>§ 344. Physical annexation and map and memorandum.</p> <p>§ 345. Deeds connected together.</p> <p>§ 346. Letters connected.</p> <p>§ 347. Examples of letters <i>not</i> sufficiently connected.</p> | <p>§ 348. Public sales. Sufficient connection of memoranda.</p> <p>§ 349. Public sales. Memoranda <i>not</i> sufficiently connected.</p> <p>§ 350. Conditions of the sale.</p> <p>§ 351. Contemporaneous writings.</p> <p>§ 352. Memoranda <i>not</i> referring to each other cannot be connected by oral proof.</p> <p>§ 353. Irregular endorsement of commercial paper. Pennsylvania rule.</p> <p>§ 354. The rule outside of Pennsylvania.</p> |
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§ 341. THE memorandum required by the Statute of Frauds may be on different papers, one of which must contain a reference to the other. (a) The reference must be clear; see *post*, § 344. (b)

(a) *Higginson v. Clowes*, 15 Ves. Dig., i. p. 386, § 169; *Crockett v. 521*; *Sandilands v. Marsh*, 2 B. & Ald. 680; *Gaston v. Frankum*, 2 De G. & Sma. 567; *Horsey v. Graham*, 18 W. R. 141; *Coupland v. Arrowsmith*, 18 L. T. N. S. 755; *Godwin v. Francis*, L. R. 5 C. P. 295; *Norris v. Cooke*, 7 Ir. C. L. Rep. 41; see *Douglas v. Grierson*, Morr. Dec. 11116; *Salmon Falls Co. v. Goddard*, 14 How. U. S. 454; *Smith v. Arnold*, 5 Mason (C. C.), 416; *Williams v. Morris*, 95 U. S. 454; *Knox v. King*, 36 Ala. 367; *Byrne v. Marshall*, 44 Ala. 357; see *Brick. Ala. Dig.*, i. p. 386, § 169; *Crockett v. Green*, 3 Del. Ch. 471; *Burke v. Haley*, 2 Gilm. 614; *Bourland v. Co. of Peoria*, 16 Ill. 538; *McConnell v. Brillhart*, 17 Ill. 360; *Frazier v. Howe*, 15 Chic. Leg. News, 296, S. C. Ill.; *Esmay v. Gorton*, 18 Ill. 483; *Wills v. Ross*, 77 Ind. 1; *New Orleans Canal Bank v. Copeland*, 6 La. Rep. 550; *Davlin v. Hill*, 2 Fairf. 437; *Freeport v. Bartol*, 3 Greenl. 345; *Sawyer v. Hammatt*, 15 Me. 40; *O'Donnell v. Leeman*, 43 Me. 158; *Moale v. Buchanan*, 11 G. & J. 314; *Drury v.*

(b) *Stocker v. Partridge*, 2 Roberts. 202. The writings must contain intrinsic proof that they refer to the same contract; *Blair v. Snodgrass*, 1 Sneed, 1.

The memoranda and the pleadings in the suit may be taken together to show the contract.(c) But both memoranda must be valid, and where one is executed on Sunday the Statute of Frauds is not complied with.(d) Where one of the memoranda is not accepted or not executed, the other writing if in itself sufficient may be enforced.(e) Where the defendant in the interrogatories in the case admitted the terms of the contract, and the fact that he had bought and offered a note for the price to the vendors, oral evidence identifying a certain sale bill is admissible to show the property bought, the only other essential fact not already proved.(f) So a statement in a bill in equity of a willingness to assume encumbrances.(g) An injunction bond may be corrected by the bill.(h) How far one or all of several letters, or other memoranda, from which the Statute of Frauds is sought to be satisfied, are liable to an agreement

Memorandum on different papers referring to each other.

Young, 58 Md. 553; *Lent v. Padelford* 10 Mass. 236; *Gill v. Bicknell*, 2 Cush. 358; *Morton v. Dean*, 13 Metc. (Mass.) 388; *Lerned v. Wannemacher*, 9 Allen, 416; *Johnson v. Trinity Church*, 11 Allen, 123; *Atwood v. Cobb*, 16 Pick. 230; *Tice v. Freeman*, 30 Minn. 389; *Fisher v. Kuhn*, 54 Miss. 483; *Scarritt v. St. John's M. E. Church*, 7 Mo. App. 178; *Packard v. Putnam*, 57 N. H. 50; *Johnson & Miller v. Buck*, 35 N. J. L. 338; *Abeel v. Radcliffe*, 13 Johnson, 300; *Baptist Church v. Bigelow*, 16 Wendell, 28; *Wright v. Weeks*, 25 N. Y. 155; 3 Bosw., 373; *New Haven Co. v. Quintard*, 1 Sweeny, 102; *Stocker v. Partridge*, 2 Roberts. Sup. Ct. 202; *Spear v. Hart*, 3 Roberts. 420; *McQuade v. Warren*, 12 N. Y. Leg. Obs. 251; *Passaic Co. v. Hoffman*, 3 Daly, 504, 505; *Newton v. Bronson*, 3 Kern. 593; *Tallman v. Franklin*, 14 N. Y. 584; *Peabody v. Speyers*, 56 N. Y. 233; *Washington Park* (matter of), 52 N. Y. 134; *Raubitschek v. Blank*, 80 N. Y. 481; *Parrish v. Koons*,

1 Parsons Eq. Cas. 84, 85; *Ward v. Orr*, 13 Pitts. L. J. N. S. 416, S. C. Pa.; *Elfe v. Gadsden*, 2 Richards. 373; *Toomer v. Dawson*, Cheeves, 69; *Leecat v. Tavel*, 3 McCord, 158; *Newville v. Stuart*, 1 Hill Eq. 166; *Cathcart v. Keirnaghan*, 5 Strobb. 129; *Blair v. Snodgrass*, 1 Sneed, 25; *Ide v. Stanton*, 15 Vt. 689; *Buck v. Pickwell*, 27 Vt. 163; see 2 Sm. L. C. (7th Am. ed.) p. 258 *et seq.*; *Will. Pers. Prop.*, 103, 104 (11th ed.).

(c) *King v. Ruckman*, 21 N. J. Eq. 605.

(d) *Hazard v. Day*, 14 Allen, 494.

(e) *Robinson v. Page*, 3 Russ. 114; *Lerned v. Wannemacher*, 9 Allen, 416; see *Carrigy v. Brock*, 5 Ir. Rep. C. L. 504; *Evans v. Miller*, 1 Kent, L. J. and Rep. 830.

(f) *Wolfe v. Sharp*, 10 Richards. 64.

(g) *Ives v. Hazard*, 4 R. I. 14.

(h) *Williamson v. Hall*, 1 Ohio St. 192; as to proving the contract from written pleadings, see *infra*.

stamp, see § 346.(i) A written acknowledgment of another instrument, if signed, is equivalent to the signature of such other instrument.(j) It is not necessary that the name of a party to a contract, for the sale of property, should be actually signed thereto; it is sufficient if the alleged contract is in writing and is subsequently recognized by one of the parties thereto, in any writing signed by him or his agent.(k) A valid verbal contract may include, by reference, an unsigned writing not intended as evidence of the contract.(l) Parol evidence is admissible to identify the writing spoken of in another writing.(m) Parol evidence is admissible to identify a draft referred to in a signed memorandum, though the draft itself was not signed.(n)

§ 342. An endorsement of a letter, offering a certain person as security, signed by such person and accepting the terms of the letter, is sufficient.(o) A written offer to buy land, signed by the defendant's agent, accepted in writing signed by the plaintiff is sufficient reciting all the contract; and this though a bond executed afterwards by the plaintiff recited the payment to be on days different from those described in the first memoran-

Examples
of memo-
randa
sufficiently
connected.

(i) See *Benziger v. Miller*, 50 Ala. 208; *Ramsbottom v. Mortley*, 2 M. & S. 445.

(j) *Gale v. Nixon*, 6 Cow. 448; *Bell v. Bruen*, 17 Peters, 168; but *secus*, if there is no reference and but one signature.

(k) *Stammers v. O'Donohoe*, 3 Can. L. T. 158, affirming S. C. below; 17 Can. Law. Jour. 84; 28 Grant, 207; 1 Can. L. T. 128.

(l) *Smith v. New York R. R.*, 4 Keyes, 198; see *Peabody v. Harvey*, 4 Conn. 122.

(m) *Morris v. Wilson*, 5 Jur. N. S. 169; *Beckwith v. Talbot*, 95 U. S. 292; *Hodges v. Horsfall*, 1 Russ. & M. 125.

(n) *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 321; 46 L. J. Q. B. 219; 36 L. T. N. S. 144; see *infra*.

(o) *Orne v. Cook*, 31 Ill. 238; see *Gale v. Nixon*, 6 Cow. 448; see *Stead v. Liddard*, 1 Bingh. 196; 8 Moore, 2. An agreement was written but not signed, and the party to be charged said that his word was as good as his bond, but that he would sign; the other party wrote expressing a preference for a signature; the party to be charged then wrote and signed a letter stating that there was no haste as to the signature, and acknowledged that he had stated his word to be as good as any signature; this was held to be sufficient. *Tawney v. Crowther*, 3 Bro. C. C. 161; S. C., *ibid.* 319, more fully given; see *Clinan v. Cooke*, 1 Sch. & L. 31; where Lord Redesdale questioned this case, and thought it ill reported; see note to *Clinan v. Cooke*, and to *Allan v. Bower*, 3 Bro. C. C. 153.

dum.(p) Where a railway sent a notice to treat with a land owner, offering a certain price and afterwards a higher price was agreed upon, and a form agreeing to convey to the company for the latter price was filled up by the company's agent and signed by the land owner, and thus signed the offer was accepted by the company, it was held that the company was bound; the notice to treat and the offer to sell, taken together, being enough.(q) Where the contract, having been written in defendant's book, he wrote to the plaintiffs to deliver to a third party "the 27 pockets Playsted, and 4 pockets Selme, 1836 Sussex" (referring to certain hops described in the same way in the original memorandum), the Court of Exchequer thought that this letter sufficiently referred to what was written in the book to make the two one writing; the decision was rested on the completeness of the entry in the book, and Parke, B., doubted whether the reference in the order was clear enough.(r)

(p) *Kerby v. Lawrence*, 1 U. C. Q. B. 185. Where property was sold by auction, and the contract was duly signed by the purchaser, but was not by the vendor, or the auctioneer acting in the matter of the sale, and subsequently in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself), wrote "Re S's purchase we would like to have it closed," and referring to certain representations made in advertisements of sale, added that "they were not made any part of the contract of sale. . . Have the goodness to let us know whether the vendor will pay cash or give mortgage. If the latter, we will purchase it at once and send you draft for approval," and on a subsequent occasion, "Re S's" purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote, "I shall take immediate steps to enforce the contract." *Stammers v. O'Donohoe*, 17 Can. Law Jour. 84; 28 Grant, 207; 1 Can. L. T., 128; affirmed in 3 Can. L. T., 158.

(q) *Smith v. Dublin R. R.*, 2 Ir. Ch. 229.

(r) *Johnson v. Dodgson*, 2 M. & W. 653. Two members of a gold exchange bank (whose officers, by the by-laws, were authorized to carry through the contracts between the members) made a contract of sale of gold for currency, and the seller, the plaintiff, wrote the cashier of the bank: "You are advised that we shall settle through the clearing department to-day with Albert Speyers," the defendant, "\$57,500 currency for \$40,000 gold," and this was signed by the plaintiff's agent and was delivered to the defendant, who, through an agent, wrote and delivered a similar order to the plaintiff, which named as parties the plaintiff or his agent; the defendant wrote to a third party a letter saying that he had bought for their account of Peabody, the plaintiff, gold in the amount and at the price named above; it was held that the three papers taken together showed a sale and not a loan, and sufficiently stated the contract. *Peabody v. Speyers*, 56 N. Y. 233.

Powell being in want of workmen applied to the Free Labor Legislation Society and filled up and signed a form sent by them to him containing the particulars of the employment and the terms offered by him, and his address at S. This form was read to Crane by the secretary of the society, and Crane then signed an agreement headed "Free Labor Society," by which he stated he had accepted employment at S., engaged to pay the society a fee out of his wages, and that he would not leave without just cause; it was held that the two papers referred to each other, and contained a sufficient memorandum, and Crane, the defendant below, was liable under the Masters' and Servants' Act for not entering into the plaintiff's service.(s) Where the defendant had promised that a judgment recovered against him as surety by the plaintiffs should stand as security for a new debt due them by the same principal, and after the obtaining of the judgment an indenture was made by and between the plaintiffs and the principal debtor, formulating the above agreement, and the defendant with another surety executed a memorandum consenting to the execution of the above deed, and saving all the plaintiff's rights against the defendant under the judgment; and this was, by the defendant's authority, attached to the deed, the latter, with the memorandum, was held to satisfy the Statute of Frauds, and the two were treated as one writing.(t) A writing

(s) *Crane v. Powell*, L. R. 4 C. P. 123 (distinguishing *Boydell v. Drummond*).

A donor signed a paper instructing her agent that she would give a certain marriage portion in a bond to the plaintiff's intended wife; the same day the agent, by the donor's direction, wrote the plaintiff recapitulating the above paper, and adding as part of the gift a certain house; the agent on the plaintiff's behalf wrote the donor, accepting the gift; Sugden, Lord Chancellor of Ireland, decided the memoranda to be one contract, and the letter to the donor, followed by the marriage, to be a sufficient acceptance. *Saunders v. Cramer*, 5 Ir. Eq. 12; S. C., *sub nom.*

Greene v. Cramer, 2 Conn. & Law. 54; 3 Dr. & W. 87; *Cramer*, the defendant, was devisee in trust for other purposes of the land claimed by the plaintiffs; see § 343.

(t) *Maerorx v. Scott*, 5 Exch. 914; 20 L. J., N. S., Ex. 90.

Where the plaintiff had signed and delivered to the defendant's ancestor two proposals of lease, and plaintiff then entered into possession, and several years afterwards the defendant's ancestor gave the plaintiff a written notice stating that the latter was to pay rent, and was to have prepared leases, but that he had not done so, and that if he did not do so in a certain time the landlord would consider

signed by the purchaser of land assigning his interest, a deed received by him, and a receipt for the deed stipulating to pay the price or return the deed, were held sufficient.^(u) Where the defendants had given a bill headed with the words "bought

his agreement rescinded; the notice read "whereas you have heretofore entered into an agreement with me," and referred to the plaintiff's written proposal (though giving the latter a wrong date); in his reply to this notice the plaintiff also referred to the agreement; it was held that the evidence was sufficient for specific performance; *Lowry v. (Lord) Dufferin*, 1 Ir. Eq. Rep. 281.

Where the defendant wrote, "I have concluded to make you the inclosed offer," etc., and inclosed was a memorandum which stated among other things that there should be "a bond like the former bond for a deed of confirmation upon the payment of," etc.; and the bond referred to was produced by the plaintiff. The memoranda were considered sufficient; *Rochleau v. Bidwell*, Dra. Rep. (U. C.) 366.

The defendant, a broker, having no interest in the land, gave, on March 10th, a receipt for deposit upon a certain tavern and fixtures, etc., "subject to my being able to get the lease;" on March 15th the defendant gave the plaintiff a memorandum reciting that the owners of the property had refused the plaintiff as a tenant, and adding, "I hereby agree to get the lease and everything for such sum of £60" (plaintiff's offer of that sum having been recited); on March 17th the defendant wrote "consider your matter settled;" it was held that the writings taken together were sufficient, that "everything" in the memorandum of March 15th referred to the fixtures, etc., mentioned in that of March 10th; *Horsey v. Graham*, L. R. 5 C. P. 13; see for

memoranda, *semble* connected, *Stanley v. Dowdeswell*, L. R. 10 C. P. 105.

(u) *Howe v. Dewing*, 2 Gray, 477.

Where a debt due from the testator did not carry interest; and the memorandum signed by executors says "that the creditor consenting to wait, they agree to pay the creditor interest," till the same is settled; it was held that they bound themselves personally for both interest and principal. Letters which, after the memorandum was made, referred to the debt as existing at testator's death, were not taken as abandoning the benefit of the memorandum, the latter was written on the account and signed by the executors; in the account was an item of both principal and interest charged, and on this ground the executors were held liable for the principal also; *Bradley v. Heath*, 3 Sim. 557.

The defendant had sold lands to the plaintiff, and had at the same time signed a contract, under seal, to purchase the land at a fixed price, at a certain future date, from the plaintiff. When that time arrived the plaintiff wrote, and signed a letter referring to the above contract, and announced his acceptance of the same and his wish to have it carried out. It was held that the agreement executed by the defendant complied with that section of the New York Statute of Frauds which declares every contract for the sale of land void, unless some note in writing expressing the consideration is subscribed by the party by whom the sale is to be made; *Burrell v. Root*, 40 N. Y. (1 Hand) 496, citing and distinguishing cases.

of Jackson," etc. (their own names), and afterwards wrote asking for time, and inquiring when they were to deliver the goods, the two memoranda satisfy the Statute of Frauds.^(v) A memorandum which speaks of "terms arranged" without describing them, and refers to "instructions" sent to a solicitor, is sufficient, with the instructions, to satisfy the Statute of Frauds.^(w)

For examples of connected writings in the case of public sales, see Sales. Where a memorandum delivered subsequently to that containing the terms of the contract, and which uses the phrases, "This contract," and "on above terms," etc., the former signed by the defendant, and the latter having his name printed thereon, the evidence is sufficient under the Statute.^(x) Where a vendor signed a memorandum of sale, and the vendee, by endorsement signed, assigned his interest therein, this latter was, if needed at all, a sufficient signature on the vendee's part.^(y) Though, as a general rule, where several memoranda differ as between themselves, no contract is made out, yet if, by reading them as one, a clear mistake can be shown, and thus a discrepancy explained, the writing may be sufficient under the Statute.^(z) Where the difference can only

(v) *Saunderson v. Jackson*, 3 Esp. 181; 2 B. & Pull., 239; see *Schneider v. Norris*, 2 M. & S. 286, criticizing this case, and doubting whether without the letter the printed memorandum would have been enough.

(w) *Ridgway v. Wharton*, 6 H. L. C. 255; 27 L. J. Ch., 46 (considering *Tawney v. Crowther*, 3 Bro. C. C. 161).

(x) *Lerned v. Wannemacher*, 9 Allen, 416.

The plaintiff, on December 1, 1879, signed a written order to supply the defendant for a year from January 1, 1880, with a horse and carriage; the parties had an interview on the subject in January, 1880, and in February, 1880, the defendant wrote the plaintiff as follows: "You no doubt remember that it was agreed at our interview on 28th of January that our arrangement

was at an end, . . . I shall be glad to know what deduction you feel inclined to make for my monthly payment if I agree to give you your carriage on Saturday next." The reference to the written offer of December 1, 1879, was sufficient, and the memoranda were sustained. The defendant admitted that he meant to refer to the offer, and it was proved that there was no other arrangement; *Cave v. Hastings* (Q. B. D.), 7 Q. B. D. 125; 50 L. J. Q. B. 575, citing *Ridgway v. Wharton*, *Bauman v. James*, and *Long v. Miller*.

(y) *Norman v. Molett*, 8 Ala. 546.

(z) *Bluck v. Gompertz*, 7 Exch. 867, where the defendant gave a written promise that upon being handed by the plaintiff the latter's two drafts upon O'C., for £200 and £146, he, the defendant, would get them accepted, and

be reconciled by oral evidence the memoranda do not satisfy the Statute of Frauds, as where there were unsigned terms of sale taken, and the defendant wrote a letter recognizing the sale, but refusing to carry it out because the goods had not been delivered within a certain time, the plaintiff was not allowed to show by parol that it was no part of the contract that the goods should be delivered within a certain time.(a)

§ 343. The following may serve as examples of memoranda which, though taken together, are not enough to satisfy the Statute of Frauds. In an English case the defendant, who, proposing to buy a certain lease, read a draft of the assignment and approved, made a part payment and took a receipt therefor, signed by the vendor's agent, which said, "the terms to be expressed in an agreement to be signed as soon as prepared," but never signed himself, though he promised to do so; the vice-chancellor, on a demurrer to a bill for specific performance, held the Statute of Frauds to be satisfied, but on appeal this was reserved as the defendant had signed nothing.(b) In *Boydell v. Drum-*

see that they were paid. The defendant afterwards wrote across the above receipt for the two drafts, one for £200 and one for £150 (the £146 being a mistake), and both accepted by O'C., and this he procured the plaintiff to sign. It was held that the endorsement was to be incorporated with the original memorandum, so as to make the latter read for £200 and £150 instead of £146, and that the defendant's original signatures sufficed under the Statute of Frauds; no new signature being necessary; the memorandum is not the contract, but only evidence of it.

(a) *Cooper v. Smith*, 15 East, 107; for example of connected memoranda see *Greenham v. Watt*, 25 U. C. Q. B. 365.

(b) *Wood v. Midgely*, 2 Sm. & G. 115; 5 De G., M. & G., 44; 23 L. J. Ch., 553; for the converse case, where the defendant signed, see *Powell v.*

Lovegrove, 8 De G., M. & G. 363. In *Knox v. Haralson*, 2 Tenn. Ch. 236, there were four writings, which the complainant sought the help of chancery to be released from: First, a certificate of October 25th, given by the complainant to the defendant, certifying that he, the complainant, had contracted for 1000 cords of wood from the defendant, etc., at 75 cts. per cord; secondly, the complainant's order on the defendant, requesting him to let one N. have 2000 cords of wood, which he, the complainant, had bought of the defendant, etc., and "I will pay you 75 c. per cord as per our agreement;" third, a certificate of the complainant that he had contracted with N. to cut and deliver 2000 cords, etc., and to pay N. therefor, etc.; fourth, a certificate from the defendant that N. was authorized to cut 2000 cords; it was held that the words, "our agreement," in one of the last three memoranda could not refer

mond(c) there was a memorandum and a prospectus, but there being no reference in the one to the other, the prospectus could not be considered a part of the memorandum. A proposed amendment to a complaint suggesting that the sheriff signed a memorandum is not sufficient when it does not state that the memorandum was incorporated in the return to the execution.(d) The following somewhat remarkable statement of law is taken from the report of the case made by a judge who dissented from the decision: A written memorandum, made by the plaintiff in his day-book, not signed by either party, or by any person for either of them, and proved by oral testimony only to have been made in the presence and with the consent of the defendant, and corroborated by the defendant's letters not referring particularly to that memorandum, nor stating the terms and consideration of the contract, is a sufficient compliance with the Statute of Frauds.(e) Where the defendant wrote a letter beginning, "after considering your proposition," etc., and accepting the offer conditionally, the acceptance did not state all the contract, and it was held that the words "your proposition" did not connect the defendant's letter with a certain alleged letter of the plaintiff's which stated the rest of the contract.(f) Where a letter referred to an agreement in "Mr. C.'s hands," and Mr. C., in fact, had two agreements, it was held that neither could be connected with the letter.(g) Where the clerk of the vendor's

to the agreement of October 25th, as the earlier note spoke of 1000 and the later of 2000 cords; see *McCaul v. Strauss*, 1 Cab. & Ell. 106.

(c) 11 East, 142.

(d) *Linn Boyd Co. v. Terrill*, 13 Bush, 464; see *Blair v. Snodgrass*, 1 Sneed, 1, for two writings regarded as not making a sufficient memorandum.

(e) *Dodge v. Van Lear*, 5 Cranch C. C. 278.

(f) *Carter v. Shorter*, 57 Ala. 257.

(g) *Price v. Griffith*, 1 De G., M. & G. 83.

The question of how far two memoranda are sufficiently connected came

up in an Irish chancery case, but the decision went off on another and less satisfactory ground; the sellers wrote, but did not sign a memorandum of sale, and afterwards, when applied to by the plaintiffs for compensation for breach of contract, wrote, speaking of the subject of the agreement, as follows: "The wheat in question was sold, etc., in Liverpool; we undertook to charter a vessel, . . . and deliver the wheat on arrival here" (in Dublin), ". . . now this wheat can never arrive, seeing both ship and it are at the bottom of the sea, and neither sense nor law can require of us the

agent wrote the plaintiffs, the vendees, stating that the vendor, the defendant, naming him, would not take less than a certain price, etc., naming terms, and the plaintiffs wrote accepting these terms, and making new ones, but not mentioning the vendor, and the clerk replied accepting the stipulations, and adding new ones, but making no further reference to the vendor, it was thought that, *semble*, the correspondence did not sufficiently show who was vendor, the writings not being connected.^(h) After a negotiation and examination of the subject of the contract, the defendant wrote, "you will please execute the order my son will give you," is not sufficient, there being then no order given by the son.⁽ⁱ⁾ A different question arises when a post-nuptial settlement is attempted to be supported by an antenuptial oral contract, there the sufficiency of the memorandum, which usually consists in a recital in the post-nuptial settlement, is not the test, but whether sufficient or insufficient as a memorandum, the later writing is refused credit, because of the danger of fraud upon creditors of the husband.^(j)

§ 344. As has been said, the two papers to make one memorandum must contain a reference in one of them to the other.^(k)

performance of an impossibility. Had the market declined instead of having advanced under similar circumstances, you very properly would have . . . refused to have delivery of the other wheat than the particular lot bought, of which you had a sample." The true question arising here is, whether the letter discussing the sale, but not describing the contract nor referring to the unsigned memorandum, can be connected together, but a majority of the court thought the memorandum and the letter inconsistent, the latter stipulating that the goods were to be at the vendee's risk, while the former made no such provision; but the two grounds of defence taken in the defendant's letter are altogether different from this one; the excuse of impossibility is no defence, and the plea that

the plaintiff if offered other wheat could have refused it, is no argument that the plaintiff is not entitled to compensation from the sellers for their failure to do their part; *Haughton v. Morton*, 5 Ir. C. L. 339.

^(h) *Hope v. Dixon*, 22 Grant, 442, but query as it was held that the clerk could not make the memorandum, and that the latter did not properly describe the land.

⁽ⁱ⁾ *Lyons v. Hughes*, 1 Vict. Rep. Law, 4.

^(j) See *Caines v. Marley*, 2 Yerg. 588; *Smith v. Greer*, 3 Humphr. 121; *Davidson v. Graves*, Ril. Eq. Rep. 231, and see "Marriage."

^(k) *Jones (Re)*, 4 Not. Ca. (Ecc. & Mart.) 532; *Waldron v. Jacob*, 5 Ir. R. Eq. 132.

But physical annexation will answer the same purpose.^(l) A contract written on a plan of the property sold, and which refers to the plan as showing what was sold, is evidenced under the Statute by both the writing and the plan.^(m) And a map under which sales were made can be resorted to to establish the title.⁽ⁿ⁾ And the plan referred to in a memorandum may be identified by oral evidence.^(o) Where the advertisement of sale referred to certain plats, the court assumed that those circulated at the sale were the same.^(p) Where a memorandum described by its name a tavern sold, and on the paper endorsed a direction that it should be put on the number in the plan, and there were two plans on which it was by different numbers, one right and the other wrong, it was held that parol evidence could explain the discrepancy.^(q) But the mere exhibition of a plan of improvement of a neighborhood will not bind the vendor, some of the points of improvement not being under the control of the latter.^(r) And it was held in another case that plats of the land made by the vendee showing the land,

Physical
annexation
and map
and memo-
randum.

(*l*) *Fisher v. Kuhn*, 54 Miss. 483; *Jelks v. Barrett*, 52 Miss. 322; *Kenworthy v. Schofield*, 2 B. & C. 945. An advertisement of sale of land pasted on the memorandum is incorporated with the latter; *Hutcheon v. Johnson*, 33 Barb. 395; see *Mayer v. Adrian*, 77 Nor. C. 84. So two papers attached which contained the conditions of sale; *McComb v. Wright*, 4 Johns. Ch. 661. So a letter containing the terms of sale as required by the vendor and pinned by the auctioneer in the memorandum of sale signed by him; *Tallman v. Franklin*, 14 N. Y. 584; see *Gill v. Bicknell*, 2 Cushing, 358. Where a guaranty did not mention the name of one of the parties, but was folded by the corners with the invoice, which contained the contract guaranteed, and which stated the party's name omitted in the other, the Statute of Frauds is satisfied; *M'Ewan v. Dynon*, 3 Vict. L. R. Law, 273. The following are

examples of memoranda physically annexed: *Hollingsworth v. Martin*, 23 Ala. 597; *Hope v. Dixon*, 22 Grant, 442; *Jacob v. Kirk*, 2 Moo. & Rob. 223; *Croome v. Lediard*, 2 M. & K. 259.

(*m*) *Nene Valley, etc., Commissioners v. Dunkler*, 4 Ch. D. 1; see *Powell v. Dillon*, 2 Ball. & B. 420.

(*n*) *Harmer v. Morris*, 1 McLean, 47; *Scarlett v. Stein*, 40 Md. 528; *Jelks v. Barrett*, 52 Miss. 322.

(*o*) *Hodges v. Horsfall*, 1 Russ. & M. 125.

(*p*) *Briggs v. Munchon*, 56 Mo. 470; see *Lee v. Mahoney*, 9 Iowa, 344, which goes to a doubtful length in making out the contract from a defective memorandum and a map.

(*q*) *Naylor v. Goodall*, 26 W. R. 162; 37 L. T. N. S. 422; 47 L. J. Ch. 55.

(*r*) (*Feoffees of*) *Heriot's Hospital v. Gibson*, 2 Dow, 312; see for reference to a map held insufficient, *Stretton v. Stretton*, 24 Grant, 20.

and returned into court, will not aid an imperfect description in the return to a *fi. fa.*(s) Where a right of common was sued upon, it was held that while a plat might be referred to to identify property passing by a deed, to give it the effect of enlarging or restricting the deed, or of creating a right in land, would be subversive of the Statute of Frauds. If the deed conveys the right in an appurtenance to the land, the plat may show what the existing appurtenances are, but if the deed does not do so, the plat cannot be resorted to.(t)

§ 345. One deed may refer to the description in another, and the two will be treated as one.(u) A written assignment endorsed on a deed of the assignor's interest under the deed, and reciting that it is for value received, is sufficient; the deed and writing are construed together.(v) Where a memorandum recited that deeds, in fulfilment of the contract had been deposited in escrow, a reference may be had to them to ascertain the subject matter of the contract.(w) Where the lessor executed a written promise to give a certain lease, and stipulating that "the lease shall be subject to such covenants as are usual in leases granted by the said obli-

Deeds
connected
together.

(s) *Thomas v. Turvey*, 1 H. & G. 438; as to contract with reference to a map, see *Andrew v. Andrew*, 8 De G. M. & G. 349; *Adams v. Scales*, 1 Baxt. 339. Where the vendor furnished the vendee with a form of proposal of purchase of land addressed to him, the vendor, and describing the property, the price, and the manner of payment, this the vendee signed. The vendor kept this, and gave the vendee a copy endorsed by the former as follows: "Copy certificate, April 20, etc., the within is a copy signed by James Fagan" (the vendee) "and left with the subscriber." This the vendor signed. This was the manner in which the vendor habitually sold his land. In an action of ejectment the vendee defending under the above contract prevailed; *Colt v. Selden*, 5 Watts, 526 (there were acts of part

performance, as by taking possession of and fencing the land).

(t) *Kenyon v. Nichols*, 1 R. I. 419.

(u) *Powers v. Jackson*, 50 Cal. 432.

(v) *Jarboe v. McAtee*, 7 B. Monroe, 281, relying on *Fugate v. Hansford*.

Where, at once, after a sale of land the vendor and vendee went to a scrivener who drew up a deed which the vendor executed, and the vendee signed a note for the price, and both note and deed were left with the scrivener who was to hand over each when the vendee, by the terms of the sale, procured security for the payment of the note. It was held that there was a sufficient memorandum under the Statute of Frauds; *Work v. Cowhick*, 81 Ill. 318.

(w) *Schmeling v. Kriesel*, 45 Wis. 328; see *Jenkins v. Harrison*, 66 Ala. 346.

gor," it was held that he was bound to give such lease, there having been equitable part-performance.(x) In a sale under a mortgage, a memorandum by the seller, written on the mortgage, "the within property was sold," and giving the terms, etc., of the sale, was held to be connected with the mortgage, and the latter by reference to a deed, so that all three could be taken together to make a memorandum of sale.(y) A general reference in a writing to the encumbrances on certain land, was held sufficient as referring to the writings which evidenced the encumbrances.(z) A receipt, referring to the "redemption" of certain land, is sufficient as referring to a mortgage wherein the land was described.(a) A will not properly executed becomes, by being referred to in a deed, a part of the latter.(b) Letters from the reversioner to a proposed tenant, referring to the "extension of lease," were held good evidence of an agreement to give a lease of the property when a subsisting lease held by a third person should have expired.(c) Where a party to a deed sealed but did not sign it, and afterwards wrote reciting the deed and claiming certain benefits thereunder, it was held that, whether or not, a signature was necessary as well as sealing; the writer of the letter made himself, by the latter, liable on the covenants in the deed.(d) Where, by marriage articles, the husband binds himself to make a settlement, but dies before signing the settlement, which was prepared for his signature, the two together constitute a valid settlement.(e)

(x) *Butler v. Powis*, 2 Coll. 161.

(y) *Lewis v. Wells*, 50 Ala. 205.

(z) *Ives v. Hazard*, 4 R. I. 14.

(a) *Hatcher v. Hatcher*, 1 McM. Eq. 311.

(b) *Izard v. Montgomery*, 1 Nott. & McC. 386.

(c) *Verlander v. Codd*, Turn. & Russ. 356.

Where a proposing purchaser sent an offer, stating all the terms of the contract to the vendor's agent, who answered by letter that the vendor accepted the offer, and the vendor executed a deed and left it with his agent

who then, on behalf of his principal, refused to carry out the contract, it was held the memoranda were sufficient, and if the correspondence was not enough the deed could be used for that purpose (the deed was mentioned in one of the letters as prepared and ready for execution); *Wood v. Davis*, 82 Ill. 312, citing cases.

(d) *Cherry v. Heming*, 4 Exch. 636.

(e) *Coventry v. Coventry*, 9 Mod. 19.

Where there were marriage articles assented to by the wife's father, but which were not signed by him, and which contained a guaranty by the

§ 346. The memorandum under the Statute of Frauds may consist of the letters of a correspondence.^(f) A series of letters are, however, not liable either singly or collectively to the stamp duty put upon agreements, because no one of them is the agreement, and neither party has control of them all.^(g) The Statute of Frauds is satisfied by a letter inclosing and referring to an invoice and bill of lading.^(h) A contract for the sale of land made by corres-

Letters
connected. father that the daughter's fortune was a certain amount, and the deed of marriage settlement recited the portions as represented, and contained a clause stipulating that the money should be settled on the wife, and while in this deed the father did not covenant to pay any such amount, he signed the deed as a witness, it was held that though, *semble*, the deed did not accord with the articles and might be corrected in favor of the son-in-law, the father-in-law was bound by the two papers together, the articles containing a stipulation that he should pay the fortune to the daughter as represented; *Bold v. Hutchinson*, 5 De G. M. & G. 564; S. C., below, 20 Beav. 250.

^(f) *Newell v. Radford*, L. R. 3 C. P. 54; *Forster v. Hale*, 5 Ves., Jr., 314; *Cooke v. Tombs*, 2 Anst. 424; *Stratford v. Bosworth*, 2 Ves. & B. 344; *Thomas v. Dering*, 1 Keen, 740; 1 Jur., 211; 6 L. J. Ch., 267; *Wynne v. Hughes*, 21 W. R. 628 (Exch.); *Verlander v. Codd*, Tur. & Russ. 356; *Huddelstone v. Briscoe*, 11 Ves., Jr., 591; see *Gamb. & Bar., Ir. Eq. Dig.* p. 1193; *Rob. & Jos U. C. Dig.*, 709; *Bell v. Bruen*, 17 Peters, 165; *Norton v. American Ring Co.*, 1 Fed. Rep. 686, C. C. S. D. N. Y.; *Neufville v. Stuart*, 1 Hill Ch. (So. Car.) 166; *Matteson v. Scofield*, 27 Wis. 677; see *Law Journal (Eng.)*, Dec. 16, 1882; *Dilworth v. Bostwick*, 1 Sweeny, 582; see *Bell's Comm.*, McLar. ed., vol. i. p. 343, where col-

lecting a contract from a long correspondence was thought dangerous, and where it was said that an obligor should be able to put his finger on a specific engagement and be able to say "here is my engagement."

^(g) *Benziger v. Miller*, 50 Ala. 208; see, however, *Ramsbottom v. Mortley*, 2 M. & S. 445.

^(h) *Draper v. Pattina*, 2 Spears, 296. Where the seller had sent certain candles and cheeses with an invoice, and on the latter the buyer wrote: "The cheese came to-day, but I did not take them in, for they were badly crushed; so the candles and cheese is returned." The memorandum was considered sufficient, "the cheese" meaning "these cheeses;" *Wilkinson v. Evans*, L. R. 1 C. P. 410; 35 L. J. C. P. 224. So a letter by way of answer sent upon the receipt of an invoice in the usual form, and in which letter the buyer objects to the quality and condition of the goods, is, together with the invoice, sufficient; *Hicks v. Cocks*, 67 L. Times, 386 (Tredegar County Court). So a bill, giving the parties, price, and subject matter, and headed with a printed signature, followed by a letter from the sellers asking where the goods are to be delivered, and asking for further time for delivery of part, constitute a sufficient writing under the Statute; *Sanderson v. Jackson*, 3 Esp. 181; 2 B. & Pull. 239 (the fuller report).

pondence is valid, and will be enforced if the terms appear with sufficient certainty to enable the court to decree specific performance; and a letter written on the 1st of the month proposing a purchase, and calling for an immediate answer with an answer dated the 4th, makes a sufficient memorandum.⁽ⁱ⁾ Where the plaintiff and the defendant's sons signed an agreement, agreeing to buy cattle from the defendant, who did not sign; the defendant wrote, referring to the agreement, and kept the latter in his own possession, the Statute of Frauds was held to be complied with.^(j) In another case it was said, that the only question there was whether the guaranty was by the defendant to the plaintiffs in consideration of their forbearance to Wilson. By the first letter, the defendant proposed certain terms to the plaintiffs, which appear to have been accepted by them, in consequence of which the guaranty was given and recognized by the defendant more than a year and a half afterwards. The correspondence and guaranty, therefore, must be taken as constituting one agreement or transaction; and more particularly so, as the last letter of the defendant adopts the terms of the guaranty, and recognizes those of the former letter on which it was founded.^(k) Where a letter asked the price of land,

(i) *Neufville v. Stuart*, 1 Hill Ch. (So. Car.) 166.

(j) *Beckwith v. Talbot*, 95 U. S. 292. Where the plaintiff, one Campbell, subscribed a memorandum, viz: "I, John Campbell, agree to purchase from Messrs. Denniston & Hudspeth" (the defendants) "Lot 8, 2d Concession Verulam, for the sum of \$750, payable as follows: \$100 down, and the balance secured by mortgage," etc., and this memorandum was written by Hudspeth, one of the defendants, who also wrote to Denniston, the other defendant, that he had sold the lot to Campbell, the memoranda were held to be sufficient; *Campbell v. Denniston*, 23 U. C. C. P. 343, citing cases.

(k) *Coe v. Duffield*, 7 Moore, 255, citing *Jackson v. Lowe*. A draft of the contract signed by one party, and accepted in a letter signed by the other, satisfies the Statute of Frauds, though the letter made some modification of the agreement; *Western Union Tel. Co. v. Chicago & P. R. Co.*, 86 Ill. 252 (there was, however, part performance); see *Powell v. Lovegrove*, 8 De G. M. & G. 363 (where the letter stated that it was to be the memorandum till the agreement could be prepared). Where the defendant's (the vendor's) pleadings showed that on a certain date the plaintiff had offered to buy certain land from him, and that he had refused, and where the defendant in declining the offer, made in writing

and the reply stated this and stated the vendor's intention to draw on the vendee as the latter had proposed in his letter, and the draft is made upon a third person and accepted, the papers all taken together make out the contract.^(l) In a modern English equity case, the vice-chancellor (Gifford) said he thought sufficient appeared on the face of the correspondence and the telegrams taken together to constitute a binding contract. The defendant several times referred to what he considered "an obligation" and "an engagement," which could only have referred to the terms of an agreement as elucidated by the correspondence.^(m)

§ 347. The two following cases are examples of a correspondence which failed as proof of the contract: in the first the contract being sought to be proved by letters and a sold note (the latter describing the subject matter), it was held that the evidence was insufficient to connect the bill with the letters, where the defendant

Examples
of letters
not suffi-
ciently
connected.

another proposal which the plaintiff agreed to, the contract was regarded as sufficiently proved; *Washburn v. Fletcher*, 42 Wis. 170.

(*l*) *Patton v. Rucker*, 29 Tex. 407. To an action for services the defendant set up a counter claim that the plaintiff was to take a certain sum in stock, and by the sale of the stock he was paid, and that a balance was due the defendant. This was considered sufficiently proved by an account by the plaintiff charging himself with the stock sent in reply to an account stated by the defendant, and preceded by a letter of the plaintiff's asking for the account, stating that he held the account, and promising to pay the balance; *Napier v. French*, 40 N. Y. Superior, 122. In a suit for the specific performance of a lease by a tenant against the alleged landlord, the facts were, that during a negotiation, the defendant's solicitor had a surveyor report what repairs the property required; the surveyor made a written

report on this point, and recommended a lease of 14 years. The plaintiff would not agree to less than twenty-one years, which the defendant refused. The defendant afterwards, March 20, wrote that he was willing to give a 14 years' lease "at the rent and time agreed on, such lease to commence," etc. It was held that the memorandum of March 20th could be connected with the surveyor's report to make a sufficient memorandum under the Statute of Frauds, there being no evidence that there were ever any other terms agreed on; *Bauman v. James*, L. R. 3 Ch. App. 511, citing *Ridgway v. Wharton*, etc.

(*m*) *Coupland v. Arrowsmith*, 18 L. T. N. S. 756, the court saying of *Harnett v. Yeilding*, 2 Sch. & Lef. 549, the case cited by the defendant was a different one. That had reference to a public advertisement, which was considered not to be incorporated in the agreement. This was a different case; he must, therefore, overrule the demurrer.

wrote "on bills rendered you say cash," etc., and the plaintiff replied, speaking of "my bill sent you," and "paying the oil bill," but where none of the letters referred to the sold note.⁽ⁿ⁾ Where a receipt not signed by the defendant, the purchaser, had been given for part of the price of a house sold, and the only paper executed by the defendant was a letter, as follows: "Please ask the captain if he will let the rest go this year on the payment of the house. If he will, I can make the payment this year. . . . Tell him I can send him all the money I have made," . . . etc. It was held that the Statute of Frauds was not satisfied, there being no reference to the receipt.^(o) Where the proof was a memorandum of sale of some fifteen thousand oaks, no vendor's name was given, the defendant wrote the plaintiff, saying, "when I ordered the few oaks I requested that they might not be sent until. . . . I am much surprised at receiving an invoice and advice . . . of your having shipped a quantity for me." It was held that the letter did not make sufficient reference to the memorandum.^(p) Sir George Jessel thought that making out a contract from informal letters, where the parties contemplated a formal contract, had gone too far.^(q) Where a purchaser at auction wrote, "I return the gray mare, lot 49, bought at your sale to-day, as not being steady in harness," it was held that this letter must refer to the catalogue, and not to the sales-ledger, which is not shown purchasers, and, therefore, the contract could not be made out by taking together the letter and the ledger.^(r)

§ 348. An auctioneer's memorandum, referring to a writ of *fiери facias*, under which the sale was made, makes a good memorandum, the writ helping out the incomplete note.^(s) The conditions of sale, if not signed or referred to in another writing, must be an-

Public sales; sufficient connection of memoranda.

(n) *Stocker v. Partridge*, 2 Roberts. 202.

(o) *Smith v. Jones*, 11 Reporter, 769; 66 Ga. 342.

(p) *Smith v. Dixon*, 3 Jur. 771, distinguishing and criticizing *Saunderson v. Jackson*.

(q) *May v. Thomson*, 20 Ch. D.

716; 51 L. J. Ch., 917; 47 L. T., 295; see for insufficient memoranda.

(r) *Peirce v. Corf*, L. R. 9 Q. B. 214. See for correspondence held to show no contract *McPherson v. Cameron*, 15 U.C.Q. B. 53; *Taylor v. Knowles*, 30 id. 205; *Kinghorne v. Montreal Telegraph Co.*, 18 id. 66.

(s) *Elfe v. Gadsden*, 2 Rich. 373.

nexed to the latter if both are to be treated as one writing.^(t) Conditions of sale, with the memorandum of the purchase endorsed thereon, are sufficiently connected.^(u) So where a sale was made under a map, indicating the lots of land by numbers, and on the advertisement were written the numbers of the lots, and opposite each number the purchaser's name.^(v) So where the auctioneer entered the initials of the buyer's agent in the catalogue of chattels for sale, and the buyer wrote a letter recognizing the sale.^(w) So a levy endorsed on an execution against land, and an entry in the same words in the sheriff's book.^(x) So an imperfect memorandum made by the sheriff at the time of the sale in a sales-book, and a memorandum made later in the proper book.^(y) A sheriff's memorandum, viz., "Partition-land, Louis Robert v. B. T. Adams, etc., lot 11, 274 $\frac{8}{100}$ a., Louis Robert \$10.50 per a., \$2885.40, was held to be sufficiently connected with the partition-suit by the title recited, and that the Statute of Frauds was complied with.^(z) But an amendment to a complaint is insufficient if it does not state that a sheriff's memorandum was not incorporated with the return to the execution;^(a) and an imperfect return cannot be supplemented by the private memorandum book of the auctioneer.^(b) A memorandum of a sale

(t) *Sandford v. O'Donohoe*, 1 Rob. & Jos. Upper Canada Dig., pp. 342-3; see *supra*.

(u) *Sale v. Lambert*, L. R. 18 Eq. 3; *Dobell v. Hutchinson*, 3 A. & Ell. 371.

(v) *Jelks v. Barrett*, 52 Miss. 323.

(w) *Phillimore v. Barry*, 1 Campb. 513.

(x) *Secrist v. Twitty*, 1 McM. 255.

(y) *Christie v. Simpson*, 1 Rich. (O. S.), 408.

(z) *Wiley v. Robert*, 27 Mo. 388.

(a) *Linn Boyd Co. v. Terrill*, 13 Bush, 464.

(b) *Remington v. Linthicum*, 14 Pet. 84.

contain at least in one of them a reference to the other: On the order of sale issued on a judgment, the sheriff endorsed the following memorandum, viz:—

"Sold to Asa J. Ridgway for twenty-four hundred dollars, October 16, 1869.

"J. D. Phelps, sheriff L. C.

"By Wm. H. H. Whitehead, Dep'y."

The above memorandum is all the evidence there was, except such as was oral, that Ridgway purchased the land at the sheriff's sale.

It appears to us that the memorandum is clearly insufficient. A memorandum, in order to be sufficient within the Statute, must state the contract with such reasonable certainty that its terms may be understood from the writing itself without recourse to parol

The following case is an example of the strict application to public sales of the rule requiring the memoranda to

of goods at a certain price per pound, but not giving the weight, and a later memorandum giving the weight, is sufficient under the Statute of Frauds.^(c) So a notice specifying the terms and conditions of the sale of land, the plat of the property upon which was entered the name of the purchaser and the price, and a letter of the purchaser relating to the sale.^(d)

proof. It is impossible to ascertain from the memorandum what it was that was "sold to Asa J. Ridgway for twenty four hundred dollars."

It may be supposed, from the fact that the memorandum was endorsed on the order of the sale, that the sheriff meant that the land therein ordered to be sold was sold to Ridgway for the sum named.

But this would rest upon mere inference, and not upon anything appearing on the face of the memorandum. It may be conceded that, if the memorandum had in any way referred to the order of sale for the purpose of identifying the thing sold, so as to make it a part of the memorandum, or so that the two papers—the order of sale and the memorandum—could be taken together as constituting the contract, it would have been sufficient.

The memorandum endorsed upon the order of sale, but without any reference to it, for the ascertainment of the thing sold, is no better than if it had been made on any other piece of paper; *Ridgway v. Ingram*, 50 Ind. 149 (citing cases.)

(c) *Clarkson v. Noble*, 2 U. C. Q. B. 364.

(d) *Lee v. Mahony*, 9 Ia. 344; though the letter did not refer to the plat, and neither the letters nor the plat showed the vendor nor the terms of sale.

The purchasers, at an auction, signed a paper agreeing to take lots set opposite their names, "according to the terms made known at the time of sale"

. . . "having made the payment according to the conditions of sale." The only conditions of sale were in a handbill circulated at the time of sale; this was held sufficient reference to satisfy the Statute of Frauds; *Dalton v. McBride*, 7 Grant's Ch. U. C. 293, citing *Western v. Russell*, *Saunderson v. Jackson*, *Ridgway v. Wharton*. The court thought that while Lord Cranworth's statement of the law made below was too restrictive, his statement in the House of Lords was too loose. The court, referring to *Boydell v. Drummond*, *Hinde v. Whitehouse*, *Coles v. Trecothick*, *Kenworthy v. Schofield*, had some doubt, but followed recent authority.

Where there was a memorandum made by an auctioneer, as follows: "I hereby acknowledge that I have this day purchased from Mr. Stafford, the vendor, by public auction, subject to his approval, the premises mentioned in annexed particulars, etc.;" signed by the plaintiff, the vendee, and by the auctioneer's clerk as witness, the particulars gave the full name, "John Stafford, the vendor," and on the memorandum was a printed endorsement, signed by the auctioneer, by a printed signature containing the announcement and particulars of the sale, the Statute of Frauds was held to be satisfied; *Dyas v. Stafford*, L. R. 7 Irel. 599, citing *Saunderson v. Jackson*, *Schneider v. Norris*.

At an auction sale of land the conditions of sale, and the formal contract would have sufficiently shown the con-

Where the defendant, an auctioneer and house agent, showed the plaintiff a description entered in the former's book of land for sale, and the plaintiff afterwards wrote, "I hereby agree to purchase the three plats, etc., of land at Hammersmith, etc.," and the defendant gave the plaintiff a receipt, "Received of Mr. George Long the sum of, etc., as a deposit on the purchase of three plats, etc., at Hammersmith," it was held that the memoranda were sufficiently connected.^(e) It was thought, in a Scotch case, that a lease defective in not giving the length of the term, might be supplemented by the advertisement of sale which did.^(f)

§ 349. Where the different memoranda are contradictory, not only is no contract made out, but neither memorandum can be solely relied on, as where an auctioneer's memorandum by its silence raised an implication that the price was to be cash, it was held that the conditions of sale, though not referred to in the writing, were admissible to show that the contract was for a payment on credit.^(g) And where an ambiguity arose from collocation of different writings containing the terms of sale, parol evidence to explain is inadmissible.^(h) But the ruling of *Hinde v. Whitehouse* has, in Virginia, been limited to the case where the vendee insists upon the credit, and it was held that if he chose to treat the sale as for cash he could

Public sales; memo-
randa not
sufficiently
connected.
tract if the price per acre had been inserted; on the back of the document was the entry: "Conditions of sale, to Thos. Maher, 20 l. an acre," and signed by the auctioneer; Maher was the buyer. This satisfied the Statute of Frauds; (*Cloohesy v. Maher*, 6 Vict. L. R. Law, 559.

(e) *Long v. Miller*, 48 L. J. Q. B. 596; 27 W. R. 720, before the Lords Justices.

Where an auctioneer's book was made up of files of sales-memoranda fastened together before the sales, the terms of sale were written in the book and reference was made in these to special terms contained in the sheets,

and at the head of the sales-sheet special terms were written, and there also was contained the entry of the particular sale made; the connection is sufficiently established between all these stipulations; (*Coate v. Terry*, 24 U. C. C. P. 573.

(f) *Russell v. Freen*, Sess. Cas., 13 S. 752; 10 Fac. Dec. (Octav.) 486, there was part performance.

(g) *Hinde v. Whitehouse*, 7 East, 568; see, as to contradictory writings, *Jones v. Victoria Graving Dock*, etc.; see § 348, n., *Ridgway v. Ingram*.

(h) *Higginson v. Clowes*, 15 Ves. 521; S. C., *sub nom.* *Clowes v. Higginson*, 1 V. & B. 524.

do so.⁽ⁱ⁾ In Louisiana it is held that the condition of sale must be in writing.^(j) And the name of the purchaser, if not connected at least by a caption with the memorandum, cannot form a part of the latter.^(k) It has been held that the advertisement, in order to be proof of essential terms of the contract, must be referred to in the other writings.^(l)

§ 350. Conditions of sale, if not referred to in the memo-

(i) *Smith v. Jones*, 7 Leigh, 170.

(j) *Macarty v. New Orleans Canal Co.*, 8 Robins. 104.

Where the catalogue of an auction sale described a horse as "Lot 49, gray mare, six years old, steady to ride and drive," and the entry in the sales-book was "Lot 49, gray mare, age;" and the seller wrote, "I return the gray mare, lot 49, bought at your sale to-day, as not being steady in harness;" it was held that the letter was not sufficient, as not stating the price; that it referred by the words "Lot 49" to the catalogue, and not to the sales-ledger not shown the purchaser; and as the catalogue did not give the price there was no compliance with the Statute of Frauds; *Peirce v. Corf*, L. R. 9 Q. B. 214.

(k) *Gill v. Bicknell*, 2 Cushing, 358.

In a Canadian case, where one of the conditions of sale was, viz., "the vendor shall have the option of a reserved bid in the hands of the auctioneer," which bid was in fact as follows: "Re-sale Allan Wilmot's farm; reserved bid \$105 per acre;" it was held that, though the two were read together, they did not identify the vendor so as to satisfy the Statute of Frauds; *Wilmot v. Stalker*, 18 Can. Law Jour. 178; 2 Can. L. Times, 254; U. C. Ch. Div., citing *Shardlow v. Cotterill* below (since reversed); *Vandenburgh v. Spooner*.

In a case at the Common Pleas of

Upper Canada the facts of the case were as follows: There was an auction of the defendant's property, consisting of farming stock and other articles. The printed bill advertising the sale contained the terms and conditions of sale, which were announced at the sale by the auctioneer. The plaintiff was the highest bidder for some of the articles to the value of \$52; and they were knocked down to him, and his name entered by the auctioneer's clerk on one of several sheets of paper used by him at the time to make the entries of the sales, namely, the names of the purchasers, etc.; but these sheets of paper were not attached to the paper containing the conditions of sale, nor was any reference made to them. And, said the judge, who delivered the opinion of the court: "The cases cited by my brother Galt seem to be recognized as good law to the present day, though it may not to some minds appear reasonable that where the conditions appear in the printed bill of sale, and they are announced at the sale and the auctioneer, as the recognized agent of vendor and purchaser, signs the name of the vendee to a list of names of other purchasers of the articles mentioned in the printed bill, that the latter should necessarily be annexed to the list of names; *Kaitling v. Parkin*, 23 U. C. C. P. 569.

(l) *Ashcom v. Smith*, 2 Penr. & W.

218.

randum, do not form part of the contract merely because read aloud, or exhibited at the sale.^(m) Even though signed by the defendant, if signed and published before the sale, and not afterwards referred to by the memorandum.⁽ⁿ⁾ While the cases are not all agreed on the point, the preponderance of authority denies to an advertisement of sale, handbills, etc., though signed by the vendor, any efficacy to bind him under the Statute of Frauds to comply with a parol sale made in accordance with these papers.^(o) And it has been held that the advertisement is not proof of the contract unless referred to in a writing; that its office is to give notice of a sale in future, not to prove its terms.^(p) An early case in Kentucky takes an opposite view of this point.^(q) Where the defendant, a vendor, sold a certain house, etc., and at the foot of the conditions of sale the auc-

(m) *O'Donnell v. Leeman*, 43 Me. 160; *Kenworthy v. Schofield*, 2 B. & C. 945; *Clinan v. Cooke*, 1 Sch. & Lef. 31; *Megaw v. Molloy*, L. R. 2 Irel. 540; *Rishton v. Whatmore*, 8 Ch. D. 468; 26 W. R. 827; 47 L. J. Ch., 631; *Johnson v. Buck*, 35 N. J. L. 340; *Thomas v. Ross*, 19 Up. Can. Q. B. 372; *Burke v. Haley*, 2 Gilm. 614; *Morton v. Dean*, 13 Mete. (Mass.) 388; *Baptist Church v. Bigelow*, 16 Wend. 28; *Knox v. King*, 36 Ala. 367; *Davis v. Robertson*, 1 Const. Rep. 71; *Mayer v. Adrian*, 77 Nor. C. 84.

(n) *O'Donnell v. Leeman*, 43 Me. 160. See *Kaitling v. Parker*, *supra*. In *Kenworthy v. Schofield*, 2 B. & C. 948, Holroyd, Judge, said, "upon the authority of *Hinde v. Whitehouse*, I both think that auctions of goods are within the Statute of Frauds, and that there has not been a signature to a memorandum of the bargain sufficient to satisfy the seventeenth section of that act. It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it. The argument for the plaintiff is, that the

conditions being in the room were virtually attached to the catalogue. But I think that as they were not actually attached or clearly referred to, they formed no part of the thing signed. In the case put of a separation of the conditions from the catalogue, during the progress of the sale, I should say that the signatures to the latter, made after the separation, were unavailing. It occurred to me at first, that this might be likened to the case of a will, consisting of several detached sheets, when a signature of the last, the whole being on the table at the time, would be considered a signing of the whole; but there the sheet signed is a part of the whole. Here the catalogue was altogether independent of the conditions. I agree, therefore, that this rule for a nonsuit must be made absolute."

(o) *Kurtz v. Cummings*, 24 Pa. St. 35.

(p) *Ashcom v. Smith*, 2 Pen. & W. 218.

(q) *Hobby v. Finch*, Kirby, 15 (one judge diss.); see *White v. Watkins*, 23 Mo. 426, denying *Hobby v. Finch*.

tioneer signed the following: "The property duly sold to Mr. Arthur Shardlow, etc., deposit paid," etc., and gave the following receipt: "Received of Mr. Arthur Shardlow the sum of, etc., as deposit on property purchased, at four hundred and twenty pounds, at the Sun Inn, Pinxton, etc., Mr. George Cotterill, owner;" and previously to the sale a poster was exhibited in the neighborhood describing the land; it was held by Kay, J., that the Statute of Frauds was not satisfied, because the property was not described; the poster was not referred to, and the description in the receipt, "property purchased at four hundred and twenty pounds at the Sun Inn," etc., was not sufficient. The Court of Appeals, however, reversed this decision, and held the word "property" as above, was a sufficient description.^(r)

§ 351. An exception has in a few decisions been made to the general rule requiring several writings to contain a mutual reference, in order that they may make an entire memorandum; and this where the papers are contemporaneous. In a New York case it was said that the note sued upon, and the agreement given in evidence by the defendant, are contemporaneous writings between the same parties upon the same subject-matter, and the action being between the same parties or their representatives, they may be read and construed as one paper.^(s) So three deeds, not referring to each other, but relating to the same subject-matter, and contemporaneous, were treated as one.^(t) Another decision in the same state lays down the law as follows: "It is undoubtedly true that several deeds or other writings executed between the same parties at the same time, and relating to the same subject-matter and so constituting parts of one transaction, should be read and construed together as forming parts of one assurance or agreement. It is not necessary that the instruments should in terms refer to each other, if in point of fact they are parts of a single trans-

Contem-
poraneous
writings.

(r) *Shardlow v. Cotterill*, per Kay, J., 44 L. T. Rep., N. S. 549; 50 L. J. Ch., 613; 18 Ch. D., 280; Court of Appeals, 20 Ch. D. 90; 51 L. J. Ch. 353; see § 419.

(s) *Rogers v. Smith*, 47 N. Y. 327 (citing *Hunt v. Livermore*, 5 Pick. 395; *Draper v. Snow*, 20 N. Y. 331).

(t) *Jackson d. Trowbridge v. Dunbaugh*, 1 Johns. Ca. 95.

action. But until it appears that they are such, either from the writings themselves or by extrinsic evidence, the case is not brought within the rule. Now, here there is no reference in either of the deeds to the other; nor is there any extrinsic evidence, if such would have been admissible, that they were both parts of an act. They are between the same parties, and have the same date; but it is not inferable from those facts alone that they are parts of a single transaction. It may very well be that the same parties should have several transactions in one day, and of the same general nature; and yet that each one should be distinct from and wholly independent of the other.”(u) A memorandum and deed executed, acknowledged, and shown the vendee, and returned approved by him to the vendor, were read together, though not referring to each other, because the parties were the same, and the price, etc., and because the pleadings admitted the two to be part of the same *res gestae*; but it was said that if either had been unsigned a reference would have been essential.(v) This ruling was approved by a *dictum* in a later case, which said that a deed for land and a mortgage for the price deposited in escrow would have been read together if the deposit had been contemporaneous.(w) For an example of contemporaneous writings read together, see note.(x) And where the memorandum, signed by the plaintiff, was followed by a counterpart not containing the plaintiff’s name, but signed by the defendant’s

(u) *Cornell v. Todd*, 2 Denio, 133 (citing cases): the deeds related to different lots of land.

(v) *Thayer v. Luce*, 22 Ohio, 74.

In *Jenkins v. Harrison*, 66 Ala. 357, the court said: When the memorandum of April 3, 1871, is taken and read, and it must be in connection with the deeds subsequently executed, there is no doubt or uncertainty as to the terms of the contract for the sale of lands. True, the deeds do not expressly refer to the memorandum; but they were all executed as parts of a single transaction between the same parties, having reference to the same subject mat-

ter. The rule is general, that several papers relied on to meet the requirements of the Statute of Frauds should on their face indicate a reference to each other. (*Carter v. Shorter*, 57 Ala. 253; *Knox v. King*, 36 Ala. 367.) The rule is not absolute, and there are cases in which parol evidence of contemporaneous facts, and of the circumstances in which the parties were when the writings were signed, will be received to show their connection.

(w) *Campbell v. Thomas*, 42 Wis. 441 (citing *Thayer v. Luce*).

(x) *Hunt v. Livermore*, 5 Pick. 397.

agent, the two were held a good memorandum.(y) Memoranda signed each by one party and interchanged form one writing.(z) Where the sale is of chattels of a less price than £10, the oral explanation given at the sale by the auctioneer will bind, as the admission of such evidence is forbidden only by the Statute of Frauds.(a) A sheriff having, at the sale of a tract of land, stated that a smaller tract was reserved out of it and was not to be sold, the purchaser hearing this statement is bound by it, and it may be proved by parol.(b) It has also been decided that the court will assume that the sales-list contained the terms of sale if any.(c) As to proof of consideration from contemporaneous writings, see § 443, § 444 *et seq.*

§ 352. Memoranda which do not refer to each other cannot be connected by verbal evidence.(d)

§ 353. Before leaving the subject of the memorandum, made up of several separate writings, there remains for consideration the perplexing point of the liability, which arises when a stranger to a promissory note or bill endorses. It will not be necessary to enter into a discussion of the many views which have been taken of the liability of such an endorser by those courts, which have held him

Memoranda not referring to each other cannot be connected by oral proof.

Irregular endorsement of commercial paper; Pennsylvania rule.

(y) *Lerned v. Wannemacher*, 9 Allen, 416.

(z) *Jones v. Pennel*, 1 Phila. 539 (citing cases at common law apart from the Statute of Frauds).

(a) *Eden v. Blake*, 31 M. & W. 617.

(b) *Bartlett v. Judd*, 21 N. Y. 203.

(c) *Cherry v. Long*, Phill. Law. 467.

(d) (*Lord*) *Walpole v. (Lord) Oxford*, 3 Ves. 402; *Higginson v. Clowes*, 15 Ves. 521; *Kronheim v. Johnson*, 7 Ch. D. 60; 37 L. T., N. S. 751; 26 W. R., 142; *Horsey v. Graham*, 18 W. R. 141; *Coupland v. Arrowsmith*, 18 L. T. N. S. 755; *Godwin v. Francis*, L. R. 5 C. P. 295; *Boyce v. Green*, Batty, 616; *Smith v. Arnold*, 5 Mason C. C. 414; *Salmon Falls Co. v. Goddard*, 14 How. 447; *Knox v. King*, 36 Ala. 369; *Bourland v. Peoria*, 16 Ill.

538; *Moale v. Buchanan*, 11 G. & J. 314; *Boardman v. Spooner*, 13 Allen, 357; *Johnson v. Trinity Church*, 11 Allen 123; *Atwood v. Cobb*, 16 Pick. 230; *O'Donnell v. Leaman*, 43 Me. 160; *Brown v. Whipple*, 58 N. H. 229, citing cases; *Abeel v. Radcliffe*, 13 Johns. 300; *Stocker v. Partridge*, 2 Roberts. 202; *Spear v. Hart*, 3 Roberts. 420; *Justice v. Lang*, 52 New York, 323; *Passaic Co. v. Hoffman*, 3 Daly, 504; *Freeport v. Bartol*, 3 Greenl. 345; *Mayer v. Adrian*, 77 Nor. C. 84; *Neufville v. Stuart*, 1 Hill Eq. 166; *Cathcart v. Keirnaghan*, 5 Strobh. 129; *Toomer v. Dawson*, Cheeves, 69; *Lecat v. Tavel*, 3 McCord, 158; *Blair v. Snodgrass*, 1 Sneed, 25; *Knox v. Haralson*, 2 Tenn. Ch. 236.

liable; a slight sketch of these will be found in § 354, and the matter for immediate consideration will be the Pennsylvania decisions, which make a simple disposition of the difficulty by holding that such an endorsement is invalid equally under the law merchant and the Statute of Frauds.(e) Where a promissory note was made in the ordinary form, by a third person to the plaintiff's order, endorsed by the latter, and afterwards endorsed by the defendant, it was held that the latter's intention must have been to bind himself as an endorser, but that as second endorser he was in no way liable to the plaintiff, who was the first endorser, and that the mere endorsement of a signature is no adoption of the body of the note.(f) Where, however, S. made a note to the order of Slack, and to get it discounted Kirk's endorsement was procured and the latter irregularly endorsed above Slack, and Slack paid one-half of the note, and on threat of suit by the holder Kirk paid the other half, it was held that the latter could recover from Slack; the note being good against S. and Slack, and irregular only as against Kirk, who waived the irregularity.(g) This line of authority has not been absolutely without interruption.(h) And it was said in a Philadelphia case, that if it was the understanding that the endorser was to

(e) *Martin v. Duffey*, 4 Phila. 75; *Slack v. Kirk*, 67 Pa. St. 384; *Schaefer v. The Bank*, 59 Pa. St. 144; *Robinson v. Rebel*, 1 W. N. C. Phila. 9; *Murray v. McKee*, 60 Pa. St. 35; *Eilbert v. Finkbeiner*, 68 Pa. St. 243; *Alter v. Langebartel*, 5 Phil. 151; *Jack v. Morrison*, 48 Pa. St. 113; *Allwine v. Garberich*, 2 Pears. 28; on the general subject, 1 *American Cas., Bills*, 269, n.; and see index "Endorsement."

(f) *Jack v. Morrison*, 48 Pa. St. 116, distinguishing *Paul v. Stackhouse*, 38 Pa. St. 302, as a case where the signature was on the face of the note, making the defendant liable as a maker, thus showing the defendant's adoption of the body of the note and thereby satisfying the Statute of Frauds; *Murray v. McKee*, 60 Pa. St. 35; *Robinson v.*

Rebel, 1 W. N. Cas. 9; *Schaefer v. The Farmers' Bank*, 59 Pa. St. 145; *Wilson v. Martin*, 10 Phila. 470, where the instrument was not negotiable; distinguishing *Slack v. Kirk*, *infra*, as a voluntary waiver of the Statute of Frauds; *Alter v. Langebartel*, 5 Phila. 151; held, that an irregular endorsement could not be eked out by parol proof to make a liability where none existed, for this would be subversive of the Statute; see to the same effect *Jackson v. Barnes*, 5 Phila. 33, a case of a non-negotiable instrument.

(g) *Slack v. Kirk*, 67 Pa. St. 384, distinguished above in *Wilson v. Martin* as a case of the voluntary waiver of the Statute of Frauds.

(h) See *Hopkinson v. Davis*, 5 Phila. 147 (per Hare, J.).

be surety to the payee, the latter was authorized to write a guaranty over the former's signature.⁽ⁱ⁾ The principle of *Jack v. Morrison* does not apply where the endorsements are regular, and an affidavit that the payee discounted the note with the plaintiff, after it had been endorsed by the defendant, did not constitute a defence on the ground of the Statute of Frauds.^(j) Even in Pennsylvania an irregular endorsement can, by a separate writing sufficient in itself to comply with the Statute of Frauds, be shown to be a guaranty.^(k) In a recent case it was said that one irregularly endorsing, who had received none of the money, was not liable.^(l)

§ 354. As has been said, the Pennsylvania doctrine stands almost alone; yet it is admitted that the chief difficulty in these peculiar cases is caused by the Statute of Frauds,^(m) and the liability of the irregular endorser has indeed been regarded as doubtful;⁽ⁿ⁾ and

The rule outside of Pennsylvania.

(i) *Martin v. Duffey*, 4 Phila. 75.

(j) *Shaffer v. Danville Bank*, 1 W. N. Cas. 244; *Creveling v. The Bank*, id.

(k) *Manderbach v. Gilbert*, 2 W. N. Cas. 129; *Eilbert v. Finkbeiner*, 68 Pa. St. 247 (a letter written by the endorser to the payee acknowledging the guaranty), and where the defendant's intestate had endorsed a note above the signature of the payee, plaintiff, and afterwards below it, it was held that he bound himself, under the Statute, by the following letters:—

"MR. JAMES GILBERT:

By these lines I will inform you that Mr. Hersherberger" (the maker of the note), "told me that you agreed to give him time for \$1000, and 11 hundred he promised to pay you on the note; he said he will attend to it, and he has my and Burchholder's name.
 . . . R. MANDERBACH."

"MR. JAMES GILBERT:

Enclosed you find check for \$1100 hundred, and note for \$1000" (the original note also irregularly endorsed, having

been for \$2100), "and let me know what the expenses are, then I send it to you as soon as I know what you want. I could not due what I ought to due, but I make it all right soon.

MICHAEL HERSHERBERGER."

Manderbach v. Gilbert, *supra*, and the court below, having left it to the jury to say whether the letters referred to the promissory note, the Supreme Court, while thinking the case doubtful, affirmed the ruling made at *nisi prius*.

(l) *Metz v. Leibner*, 1 Schuy. Leg. Rec. 59, C. P. Schuylkill Co., Pa.

(m) *Dean v. Hall*, 17 Wend. 221.

(n) *Castle v. Candee*, 16 Conn. 234, where, being a case of irregular blank endorsement, the court said: Another objection to the parol evidence offered was, that it was inadmissible because opposed to the provisions of the Statute of Frauds and Perjuries. So far as such evidence came in aid or in corroboration of the legal intendment arising from the blank endorsement, or conduced to prove the consideration of

has been limited, as where oral evidence that it was the belief and intention of the parties that the endorsement of a draft by the payee should make the latter liable as surety for the drawee, was not admitted;(o) and an endorsement made after the note is due has been held invalid unless the guaranty is written out and expresses a consideration.(p) In a late Maryland case the Pennsylvania rule would appear to have been adopted, and the court said that it would seem to be too plain for question, that a mere blank endorsement of a third party on an instrument, such as we have in this case, cannot be construed into such an agreement or note in writing as will gratify the Statute; nor is the Statute gratified, either in its letter or object, by the subsequent writing placed over the signature of the appellee by the appellant.(q) The general opinion outside of Pennsylvania sustains, however, the liability of the irregular endorser.(r) The liability once assumed, and the Statute of Frauds put aside, there has been the widest range of decision as to what that liability is; where, on a promissory note made by a third party, the defendant wrote and signed, "I will pay the above at maturity," his obligation was treated as that of an original promisor, to whom the Statute of Frauds did not apply.(s) The liability has been considered as that of

the promise alleged, it was not objectionable. Nor can we say, since the cases of *Beckwith v. Angell*, 6 Conn. 315, and *Perkins v. Catlin*, 11 Conn. 227, that parol proof of a special contract different from the one implied is inconsistent with that statute, although it has been strongly intimated that, to prove in such case by parol, a mere collateral suretyship cannot be permitted. (*Leonard v. Vredenburg*, 8 Johns. Rep. 29; *Herrick v. Carman*, 12 id. 160; *Nelson v. Du Bois*, 13 id. 175; *Campbell v. Butler*, 14 id. 349; but see *Johnson v. Gilbert*, 4 Hill, 178.)

(o) *Phelps v. Garrow*, 8 Paige, Ch. 323.

(p) *Moor v. Folsom*, 14 Minn. 343; see *Turrell v. Morgan*, 7 Minn. 368, a case not

connected with the Statute of Frauds, where it was said that the endorsement of payment on a promissory note was no part of the note, and if not signed was not evidence.

(q) *Culbertson v. Smith*, 52 Md. 634, citing *Jack v. Morrison*, *Shaffer v. Bank*, and *Wilson v. Martin*.

(r) *Hodgkins v. Bond*, 1 N. H. 284; *Turrell v. Morgan*, 7 Minn. 368; *Good v. Martin*, 95 U. S. 91; *Hopkins v. Richardson*, 9 Gratt. 490; *Ulen v. Kittredge*, 7 Mass. 235 (there being parol evidence of authority to write a guaranty over the signature).

(s) *Fowler v. McDonald*, 4 Cr. C. C. 297 (holding that the consideration of the promise need not be expressed); but see, *contra*, *Crooks v. Sully*, 50 Cal. 257.

a joint-maker;(t) or that of a surety;(u) or that of a guarantor;(v) or that of an endorser.(w) An irregular endorser is a guarantor, and the memorandum is sufficient under the Statute of Frauds, and sufficiently shows the consideration,(x) or that of endorser.(y) In a Scotch case of no inconsiderable interest, the facts were that a bill of exchange was drawn, "pay to me or my order:"

Signed, "J. E. W.

"W. & T. & McK."

And addressed to "W. & T. McK."

And endorsed, "James McKinley.

"J. E. W."

And it was held that James McKinley was not liable as acceptor because he was not drawee, nor liable to J. E. W. at all, because he could only be so by a special contract, and that would be within the Scottish Statute of Frauds, 19 and 20 Vict. c. 6, § 6; *semble*, he would have been liable to a later holder as an endorser in the nature of an aval for the drawer.(z) Under the Scottish law a banker's draft, endorsed by a third person, makes the latter liable to a holder as an ordinary endorser; the instrument is a commercial one, and is not within the Scottish Statute of 19 and 20 Vict.(a)

It has also been held that over the irregular signature an endorsement may be written.(b) So, also, even in Pennsylv-

(t) *Houghton v. Ely*, 26 Wis. 185.

(u) *Green v. Collins*, 36 Ga. 583.

(v) *Fuller v. Scott*, 8 Kan. 32; *Riggs v. Waldo*, 2 Cal. 481; *Tenny v. Prince*, 4 Pick. 387; *Ford v. Hendricks*, 34 Cal. 675; *Mordecai v. Gadsden*, 2 Speers, 571.

(w) *Hall v. Newcomb*, 7 Hill, 418; *Drake v. Markle*, 21 Ind. 435; and oral evidence to show any other liability is inadmissible. In Upper Canada it has been held that an endorsement on a promissory note, I guaranty the payment of the within, is an endorsement, and not a guaranty or collateral promise; *Walker v. O'Reilly*, 7 U. C. L. J., O. S., 300.

(x) *Riggs v. Waldo*, 2 Cal. 486.

(y) *Hall v. Newcomb*, 7 Hill, 418; *Drake v. Markle*, 21 Ind. 435; and oral evidence to show any other liability is inadmissible.

(z) *Steele v. McKinley*, L. R. 5 App. Cas. 756; 17 Scot. Law Reporter, 806; S. C. below, *sub nom.* *Walker v. McKinley*, Sess. Cas. 6 R. 1132; 16 Scotch Law Reporter, 647; an aval is *semble* like an acceptance, *supra* protest.

(a) *Macdonald v. Union Bank*, Court of Sess. 2 M. 976.

(b) *Nelson v. Dubois*, 13 Johns. 175 (saying that this might be done any time before trial); *Parks v. Brinkerhoff*, 2 Hill (N. Y.) 663; *Perkins v.*

vania, *sed quære*.(c) Where the defendant, a stranger to the note, endorsed it after it was due, and the plaintiff had been a previous endorser, it was held that the defendant was not liable as endorser or maker, nor as guarantor, because the guaranty was not written out and did not express a consideration.(d) In a late case in New Jersey, the court observed that it was said in *Chaddock v. Vanness*, that when a third party puts his name on the back of a promissory note as a surety or guarantor for its payment, in pursuance of an original agreement entered into before or at the time of giving the note, in consideration of which the payee agrees to accept it, the payee may write over such signature a guaranty or promise to pay, which shall be a sufficient memorandum within the Statute of Frauds. But the case here is not analogous to those original undertakings of a third party in the creation of the debt, where, although he may be called a guarantor, his liability in legal effect differs in nothing from that of a co-maker. In such cases the Statute of Frauds is inapplicable.(e) The necessity of the consideration being expressed in such a case has been doubted, as we have seen.(f) Where a purchaser agreed to give the seller, the plaintiff, a note with the endorsement of the defendant, and the note was made to the seller's order and endorsed below by the defendant in blank, it was held, that though the endorsement was irregular, yet as the note recited to be "for value received," there was sufficient to bind the defendant.(g) See a Nevada case, where an irregular endorsement was held to create no liability because no consideration appeared in writing as required by the Statute of

Catlin, 11 Conn. 229, citing cases, and *Draper v. Putnam*, 7 Allen, 174.

(c) *Martin v. Duffey*, *supra*.

(d) *Moor v. Folsom*, 14 Minn. 343, the court saying that, where one endorses a note for the purpose of assuming the liability of a guarantor, the act is held to authorize the holder to write over the signature the contract of guaranty in full, and that being done, it is a sufficient note or memorandum in writing to take the case out of the Statute; *Beckwith v. Angell*, 6 Conn.

315; *Ulen v. Kittredge*, 7 Mass. 233; *Tenny v. Prince*, 4 Pick. 385; *Nelson v. Dubois*, 13 Johns. 175; *Campbell v. Butler*, 14 ib. 349; *Tillman v. Wheeler*, 17 ib. 326.

(e) *Hayden v. Weldon*, 43 N. J. Law Rep. 130, citing *Chaddock v. Vanness*, 35 id. 517.

(f) *Fowler v. McDonald*, *supra*; but see, *contra*, *Crooks v. Sully*.

(g) *Moore v. Cross*, 19 Law Reporter (Lowell) (Supr. C. N. Y.), 673.

Frauds of that state.^(h) It has also been held that an endorsement in blank on a non-negotiable instrument, by one intending to become guarantor, while not creating an endorser's liability, is a sufficient compliance with the Statute of Frauds, though the guaranty be written above it afterwards.⁽ⁱ⁾ But where R. H. and I. H., makers of a promissory note, of which the plaintiff was the payee, in order to obtain time, procured the defendant to guarantee it, and the defendant endorsed it in blank, and said that he was held; the plaintiff delivered the note to the defendant for collection, and afterwards wrote a guaranty over his, the defendant's, signature; it was held that this latter was not such a memorandum as would comply with the Statute of Frauds.^(j)

(h) *Van Doren v. Tjader*, 1 Nev. 388. *semble* doubting *Ulen v. Kittredge*; on

(i) *Underwood v. Hossack*, 38 Ill. 214. the general subject, see *Edw. Bills*, 3d ed. §§ 391-4.

(j) *Hodgkins v. Bond*, 1 N. H. 284,

CHAPTER XIV.

THE EXECUTION OF THE MEMORANDUM—IN GENERAL—
BY THE PARTIES.

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| § 355. Memorandum subsequent to contract.
§ 356. Post-nuptial settlements.
§ 357. Memorandum made before the contract.
§ 358. Memorandum must be signed by party to be charged.
§ 359. Memorandum need be signed only by the party to be charged.
§ 360. Equitable doctrine of mutuality; rule in New York requiring signature by the party making the sale.
§ 361. The general rule under the Stat- | ute of Frauds as to mutuality of remedy.
§ 362. Mutuality shown by action brought.
§ 363. Want of mutuality of remedy, or want of mutuality of contract.
§ 364. Cases showing want of mutuality of contract.
§ 365. General propositions.
§ 366. The rule, that under the Statute of Frauds the doctrine of mutuality does not prevail, denied.
§ 367. The rule in Pennsylvania. |
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§ 355. THE memorandum may be subsequent to the contract itself.(a) When the contract takes effect under such circumstances is a question discussed elsewhere; in a Massachusetts case it was held that the writing under all the sections of the Statute of Frauds, and the earnest or delivery under the 17th section, may be executed or paid after the contract has been made; and it was said that it is a fallacy to say that the contract was invalid when made, and cannot afterwards be rendered valid, but that it was more correct to say that before the Statute is complied with there is no contract, but a mere proposition, which a compliance with the Statute establishes as a legal contract.(b)

(a) *Barkworth v. Young*, 4 Drew. Cow. 448; *Kuhn v. Brown*, 4 Th. & 9; 26 L. J. Ch. 153; *Shippey v. Derri-son*, 5 Esp. 191; *Newton v. Bronson*, 3 Kern. 593; *Thayer v. Luce*, 22 Ohio St. 74; *Ide v. Stanton*, 15 Vt. 689; *Wil-liams v. Bacon*, 2 Gray, 391; *Cady v. Allen*, 22 Barbour, 394; *Webster v. Zielly*, 52 Barb. 482; *Gale v. Nixon*, 6

Cow. 448; *Kuhn v. Brown*, 4 Th. & C. 29; *Remington v. Linthicum*, 14 Peters, 92; *McCormack v. Smith*, 3 Mon. 432; see § 325.

(b) *Marsh v. Hyde*, 3 Gray, 331; see *Williams v. Wheeler*, 5 C. B., N. S. 299; see 9 Am. L. Rev., 435.

If, however, as has been frequently decided (see chapters on "Validity" and "Voluntary Performance"), an oral agreement under the Statute of Frauds is not invalid, but only not provable, the difficulty just stated is easily resolved; the contract was always valid from the time that it was made, and the writing enables it to be proved in a suit. The memorandum is sufficient, though subsequent, under both the 4th and 17th sections of 29 Car. II., c. 3, not being the contract itself, but only evidence of it.^(c) It has, however, been argued that there is no contract under the 17th section till the memorandum made.^(d) And in New York, where it is provided that a part payment to take a sale of chattels out of the Statute of Frauds shall be made at the time, it is held that if after the contract made the parties meet and make a part payment, the latter is made at the time of the contract and so satisfies the Statute.^(e) It being the law that the sale of a vacant benefice is simoniacal, while that of the next presentation of a full benefice is not, it has also been held that an oral sale of one of the latter class, reduced to writing after the vacancy, is simoniacal.^(f) So where a written acceptance of a written offer to buy land is handed and read to an agent on Sunday, with directions to him to mail the letter on Monday, the contract is not a Sunday contract, and binds.^(g) So where the defendant, Stockton, subscribed to an association a certain amount of money payable in land; the association, also a defendant, gave a written assignment of this subscription to the plaintiff, and the order was verbally accepted by Stockton; the Statute of Frauds was held to apply; as the order and acceptance, not the original subscription, were the subject of the suit, and the acceptance was not in writing.^(h) Where, after the breach of an oral contract within the Statute of Frauds, the parties met and reduced it to writing to satisfy the Statute, and autedated the paper to

(c) *Bradford v. Roulston*, 8 Ir. C. L. Rep. 472. citing cases.

(d) See opinions of Erle and Byles, JJ., in *Williams v. Wheeler*, 8 C. B., N. S. 299; but see *Bird v. Munroe*, 66 Me. 341.

(e) *Hunter v. Wetsell*, 57 N. Y. 377;

Webster v. Zielly, 52 Barb. 482; and see "Chattels."

(f) *Townshend v. Norwich*, 2 Bright, Husband and Wife, 113 (before Lord Eldon).

(g) *Bryant v. Booze*, 55 Ga. 447.

(h) *Stockton v. Creager*, 51 Ind. 262.

read as of the time when the contract was first made, an action will lie for a breach of contract occurring before the writing was actually made, though after its nominal date. The court said that the memorandum was not the contract itself, but only evidence of it; and that this was shown by the memorandum being sufficient, though only one party signed, and though no consideration was expressed.⁽ⁱ⁾ A subsequent memorandum antedated is sufficient.^(j) Where town lots were sold, and the crier announced that the purchasers were to have the use of a certain spring, and this was afterwards inserted in the deeds, the purchaser had an equity superior to that of the purchasers of the spring itself, who took before the deeds, but with notice of the parol contract.^(k) In another Kentucky case it was said that a subsequent memorandum was good if reduced to writing, or if the consideration was performed at once when the contract was entered into.^(l) Trespass will lie on behalf of a vendee by parol, who after the trespass gets a deed for the land.^(m) On the other hand, where a parol sale of land was made in January, and possession was given, and a note for the price de-

(i) *Bird v. Munroe*, 66 Me. 341.

(j) *Phillips v. Ocmulgee Mills*, 55 Ga. 636.

(k) *Bedinger v. Whittamore*, 2 J. J. Marsh. 553.

(l) *Schwerman v. Gunkel*, 1 Kent, Law Reporter, 406 (S. C. Ky.).

(m) *Carney v. Reed*, 11 Ind. 418. The following is an example of the potency of a subsequent memorandum: Certain land passed as follows: One-half by a title-bond from Potter to Thomas Wilborn; by devise from him to William Wilborn. The other half passed by title-bond from Potter to Champ, by title-bond from him to Miller, by parol from him to William, by parol from him to Casner, by parol from him to Edward Wilborn, and by the sheriff's sale from William and Edward Wilborn to Smith, the plaintiff. The defendant, McCormack, claimed under a title-bond from Miller: In

the parol sales the title-bond from Potter to Champ was passed as a symbol of title, and afterwards came into the possession of an agent of Miller. William and Edward wrote on the title-bond, originally given by Potter to Thomas Wilborn, a direction to the sheriff to sell to Smith, who paid the price to them. Edward Wilborn afterwards by fraud obtained a title-bond from Miller in favor of McCormack, the defendant, upon which Smith induced Miller to give him a written statement of the above facts so far as his, Miller's, connection with the case went, and the court, relying on Miller's written statement and the endorsement made by the Wilborns on the Potter bond, directing the sheriff to sell to Smith, decreed specific performance in favor of the latter; *McCormack v. Smith*, 3 Mon. 432.

livered in September, the contract was held to be as of September; but here the terms of the September note differed from those of the January contract, and the suit was against the sureties on the September note, and who were not parties to the previous contract, and between these two dates the vendor tried to get the vendee out of possession, the defendants were, therefore, in no way liable on the January contract.⁽ⁿ⁾ A widow joined with all her husband's heirs but one in a bond to sell the land, reserving dower rights to herself. The estate was sold at auction without a proper memorandum under the Statute of Frauds. The other heir had not agreed to sell; the widow died; all the heirs joined in a deed to the highest bidder at the auction, and it was held that the widow's administrator was entitled to no share of the proceeds.^(o) The theory by which the memorandum is caused to relate back to the original making of the contract was limited in an English case also, of which the facts were as follows: The plaintiff (P. F.) had negotiated to buy from J. F. a horse, but there being a disagreement as to what price had been agreed upon (whether in pounds or guineas), the plaintiff proposed to split the difference. After the lapse of some time, the defendant, an auctioneer selling for J. F., included this horse by mistake; and after the sale J. F. wrote to the plaintiff explaining the mistake, and for the first time accepting the plaintiff's suggestion of splitting the difference. It was held in a suit against the defendant (who had sold to a third person), brought for the conversion of the horse, that though, as between the plaintiff and J. F., the memorandum might be sufficient, it could not relate back to make the defendant liable to the plaintiff.^(p) In a Common Pleas ruling in England, Willes, J., said: "I make a distinction between the contract and the memorandum of the contract; the latter may be made long after the terms have been agreed to, and the making of the one is entirely distinct from the other."^(q)

(n) *Bryan v. Harrison*, 69 N. Car. 153.

(o) *Fletcher v. Carter*, 10 Cushing, 85.

(p) *Felthouse v. Bindley*, 11 C. B. N. S. 875; 31 L. J. C. P. 204; affirmed in *Scac. Cam.*, 7 L. T. N. S. 835 (*semble*

that under *Coats v. Chaplin*, the defendant was liable to J. F.).

(q) *Parton v. Crofts*, 16 C. B. N. S. 21; so said also in *Siewewright v. Archibald*, 17 A. & Ell. N. S. 1141.

A written agreement to make a deed of certain land is valid though signed by one of the obligors after the death of the obligee.*(r)* A subsequent recognition by letter of an imperfect memorandum is sufficient.*(s)* A subsequent memorandum addressed to a third person is sufficient.*(t)* The memorandum must be made before suit brought.*(u)* But it has been said that over an endorsement in blank upon a promissory note a guaranty may be written at any time before trial,*(v)* and that the memorandum may be *post litem motam*.*(w)* A sheriff's return need not be made at the time of the sale.*(x)* A return to an execution may be made at any time before the recovery in an ejectment.*(y)*

§ 356. A post-nuptial settlement, in consideration of and especially when reciting an antenuptial contract, is good under the Statute of Frauds.*(z)* A written proposal of marriage settlement was followed by a written retraction, and this by a reaffirmation (*semble* by parol) of the first letter, and the latter was held to bind as being "set up" again by the last declaration.*(a)* Where, before marriage, money under an oral contract of settlement is delivered to trustees it is good, though they do not execute the declaration of trust till after the marriage.*(b)* But a post-nuptial settlement, though supported by an antenuptial parol contract, cannot stand as against creditors, for the temptation to safely commit a fraud would be too great.*(c)*

Post-nup-
tial settle-
ments.

(r) Waller v. Logan, 5 B. Mon. 520.

(s) Salmon Falls Co. v. Goddard, 14 How. (U. S.) 454.

(t) Longfellow v. Williams, Peake Add. Case, 225; Macon v. Sheppard, 2 Humphr. 337.

(u) Bill v. Bament, 9 M. & W. 40 (Lord Abinger saying that the point was a new one); Williams v. Wheeler, 8 C. B. N. S. 299; Bird v. Munroe, 66 Me. 341; Green v. Lewis, 26 U. C. Q. B. 625, citing cases; see *dicta* in Fricker v. Tomlinson, 1 M. & G. 772; see 9 Am. L. Rev., 435.

(v) Nelson v. Dubois, 13 Johns. 175.

(w) Dobell v. Hutchinson, 3 A. & Ell. 371, citing Jackson v. Lowe.

(x) Hanson v. Barnes, 3 G. & J. 368.

(y) Remington v. Linthicum, 14 Peters, 84.

(z) Hodgson v. Hutchinson, 5 Vin. Abr. 522; see Sir Ralph Bovey's Case, 1 Ventr. 193 (before the Statute of Frauds); Luders v. Anstey, 4 Ves., Jr., 501; see chapter on "Marriage;" but see, *semble, contra*, Cooper v. Wormald, 7 W. R. 402.

(a) Bird v. Blossie, 2 Ventr. 361 (a case before the statute).

(b) Cooper v. Wormald, 7 W. R. 402.

(c) Battersbee v. Farrington, 1 Swanst. 113; Borst v. Corey, 16 Barb. 136; Reade v. Livingston, 3 Johns. Ch. 480.

§ 357. The memorandum cannot be made before the contract itself. Thus, a written contract within the Statute of Frauds does not bind a *feme covert* incompetent to contract, and an oral contract made afterwards, when *discoverte*, does not bind because of the Statute of Frauds.^(d) Though one of the articles of association of a company named the plaintiff as the solicitor of the latter, and these articles the directors signed, it was held that the writing was made *alio intuitu*, and before the contract had with the plaintiff.^(e) So the promissory note, from all liability on which an endorser has been discharged by the plaintiff's failure to protest, etc., cannot itself avail as evidence of a new promise by the endorser to answer for the same debt.^(f) Where A., who held a draft to which he was not a party, promised to save B. harmless if the latter would endorse it, and he did so endorse it, and the drawee had not made his endorsement till afterwards; and the note so endorsed by B. and the drawee was negotiated; B. had to pay, his signature, though premature, becoming good when the drawee made his.^(g) A memorandum, referring for the identification of the land to a verbal contract, either then subsisting or thereafter to be made, is insufficient.^(h) An account stated, but not in compliance with the Statute of Frauds, will not satisfy the latter, being stated under an original contract of letting, and before the vendee of the crops in suit had mown and taken them, and this though *semble* the two contracts were made at the same time.⁽ⁱ⁾

Memorandum made before the contract.

§ 358. Having ascertained what in general is the nature of the note in writing required by the Statute of Frauds, the next questions in order are as to the parties who should execute it, the manner of execution, and lastly, what it must contain. Taking the first point, there are the words of the Statute which enact

Memorandum must be signed by party to be charged.

(d) Chaney v. Flynn, 2 Kent. Law Rep. 417.

(e) Eley v. Positive Assur. Co., L. R. 1 Ex. D. 28; 45 L. J. Ex., 62.

(f) Peabody v. Harvey, 4 Conn. 122; see § 321.

(g) Kelsey v. Hibbs, 13 Ohio St. 352. B., being the plaintiff, suing A. on an

indemnity, which was the consideration of his, B.'s, becoming endorser of the draft held by A.; see the chapter on Guaranty.

(h) Whelan v. Sullivan, 102 Mass. 206.

(i) Falmouth (Earl of) v. Thomas, 1 Cr. & M. 109; 3 Tyr. 26.

that the memorandum shall be signed by the party to be charged.(j) As to the exception to this rule, which makes the vendor's signature the only one necessary, and this though he be the plaintiff, see § 359. A signature is enough; the body of the instrument need not be in the handwriting of the party.(k) As to the manner of signing, a special treatment will be had *post*. A memorandum then not signed, delivered, or intended as a complete agreement, will not be sufficient.(l) So a letter stating the terms of sale, but not signed.(m) As to deeds the rule is not the same, and the common law requirement, which is for a seal and not for a signature, is older than the Statute of Frauds.(n) A lease must be signed by the lessor.(o) And under the civil law in Louisiana, where changes made in a lease are noted in the margin,

(j) As few authorities on an indisputable rule, see *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Sievwright v. Archibald*, 17 Add. & Ell. (N. S.) 114; *Mingaye v. Corbett*, 14 U. C. C. P. 563; *Cosack v. Descoudres*, 1 McCord, 425; *Baxter v. Kitch*, 39 Ind. 554; *Earl v. Campbell*, 14 How. Pr. 333; *Haven v. Daly*, 41 N. Y. Super. 351; *Worrall v. Munn*, 1 Seld. 239; *McConnell v. Brillhart*, 17 Ill. 360; *McCarty v. Kyle*, 4 Coldw. 354; *Fox v. Kimberly*, 27 Conn. 316.

(k) *Morton v. Copeland*, 16 C. B. 535, Maule, J., saying: "I cannot call to mind any document which by the law of this country requires to be written entirely by the person who is to be bound by it, a holograph;" a holograph as such has its own position in the civil law.

Thus, in Scotland, by act 1681, collateral promises of a certain character must be evidenced by a holograph witnessed; and one who has executed an informal instrument cannot be called upon to say whether his signature is genuine or not; *Edmonstone v. Laing*, 38 Morr. Dec. 17057; but this decision

has been questioned; see *Sinclair v. Sinclair*, Bell Fol. Cas. 142.

An acknowledgment of debt signed and addressed to the creditor by the debtor, but blank as to the amounts, and afterwards filled up, but not by the debtor, is not holograph; and not being of a commercial transaction was invalid, because not properly in writing, *i. e.*, in holograph, etc.; *Hamilton v. Struthers*, 31 Scot. Jur. 44.

(l) *Sanborn v. Sanborn*, 7 Gray, 142.

(m) *Givens v. Calder*, 2 Dessaus. 171.

(n) *Cherry v. Heming*, 4 Exch. 636; *Taunton v. Pepler*, 6 Madd. 166.

(o) *Clemens v. Broomfield*, 19 Mo. 121. In a Scotch case it was held that a landlord who has signed and delivered a lease to his tenants who have gone into possession can hold them for the rent; and so, *vice versa*, as against the landlord in *Lady Murray v. Her Tenants*; the person holding the signed papers has not an option to enforce or hold it back at will; *Macpherson v. Macpherson*, 18 Fac. Dec. 352.

they must be signed by the parties.(p) The acceptance of a deed may bind the vendee to the stipulations thereof, though he does not sign.(q) Under 3 and 4 Will. IV., c. 15, s. 2, requiring that the author's consent to a play being put on the stage shall be in writing, it was held that this consent need not be either written or signed by the author; that it was in writing and was authenticated as his act is sufficient.(r) It has been said that an account stated need not be signed, acquiescence being enough.(s) In cases apart from the Statute of Frauds an unsigned memorandum verbally assented to by the other party is good.(t) A memorandum signed by the plaintiff only is insufficient.(u) A memorandum signed by the plaintiff's agent, and delivered to the defendant, stating that the former were ready to pay a certain sum for certain shares, if sold by the defendant to the plaintiff, does not bind the defendant in any way.(v) Where the drawee of a bill of exchange on presentation made a small payment, and wrote a receipt therefor on the bill, which receipt the payee signed, there is no written acceptance within the meaning of a Statute requiring such.(w) Where the vendor's note is signed by the vendee, and the vendee's by the vendor, there is no compliance with the Statute of Frauds.(x) Where a memorandum was signed by the lessor, but not by the lessee, and was not delivered, it was at most an inchoate instrument.(y) Unsigned memoranda have been sustained when containing the defendant's name, and written by himself, the name being treated

(p) *Macarty v. Lepaullard*, 4 Robin. 425.

(q) *Kershaw v. Kershaw*, 102 Ill. 311; see *Dean v. Walker*, 17 Cent. L. J. 333; S. C., Ill.; *Cooper v. Louanstein*, 22 Am. L. Reg., N. S. 744, and note; see § 387.

(r) *Morton v. Copeland*, 16 C. B. 535 (Maule, J., citing as a comparison the Statute of Frauds).

A claim against an executor for a debt due by the testator must be stated in writing under act of Maine, 1872, c. 85, but need not be signed;

and the demand of payment may be oral; *Millett v. Millett*, 72 Me. 117; see *Stevens v. Haskell*, id. 245.

(s) *Wood v. Gault*, 2 Md. Ch. 433.

(t) *Dutch v. Mead*, 36 N. Y. Super. 431; *Bacon v. Daniels*, 37 Ohio St. 281.

(u) *James v. Muir*, 33 Mich. 226; *Christie v. Dowker*, 10 Grant, 200; *Rice v. Carter*, 11 Ired. 299.

(v) *Tisdale v. Harris*, 20 Pick. 13.

(w) *Bassett v. Haines*, 9 Cal. 261.

(x) *Osborne v. Phelps*, 19 Conn. 73.

(y) *Howard v. Carpenter*, 11 Md. 276.

as a signature; see *infra*.(z) And in Louisiana a sale of land has been held to be valid under the Spanish law without the signature of the vendor.(a) Where there are several to be charged all must sign.(b) And where an agent who drew the memorandum had no authority to bind one of the vendors, the other was not bound;(c) but where a memorandum was signed by one partner of a firm selling, and was also signed by the purchaser, it was held that the latter, being the defendant, was bound, and whether the plaintiffs were bound was not decided.(d) It has been held that the signature of one of a firm is sufficient, the partners being agents for each other.(e) In Massachusetts it has been indeed said that a collateral agreement purporting to be by two is valid against that one of the two who alone executes it.(f) And where the following facts appeared, that Dickson, the defendant below, and C. owned land which they agreed to sell to F. and B., under whom Green, the plaintiff, claims; C. executed a title-bond which ran in the names of Dickson and himself, and took notes for the price payable to Dickson and himself; C. declared that Dickson's signature to the title-bond was unnecessary, and Dickson made the statement, that he had parted with his interest to C.; it was held that Dickson was estopped, notwithstanding the Statute of Frauds to dispute the plaintiff's title; but *semble secus* if the dispute had been with C.(g) Where an administratrix executed a lease, and the children of

(z) *Wise v. Ray*, 3 Iowa, 431; *Johnson v. Dodgson*, 2 M. & W. 653; and see *Higdon v. Thomas*, 1 H. & Gill, 145; but see *Graham v. Fretwell*, 4 Sc. N. R. 25; 3 M. & G. 368; *Traylor v. Cabanne*, 8 Mo. App. 133.

(a) *Choppin v. Michel*, 11 Robins. 237, note; see *Devall v. Choppin*, 15 La. 574.

(b) *McIntire v. Bowden*, 61 Me. 158; *Gilbert v. Trustees of East Newark*, 1 Beasley, Ch. 203.

(c) *Snyder v. Neefus*, 53 Barb. 66.

(d) *More v. Smedburgh*, 8 Paige, 607.

(e) *Salmon Falls Co. v. Goddard*, 14 How. U. S. 454.

(f) *Adams v. Bean*, 12 Mass. 139.

(g) *Dickson v. Green*, 24 Miss. 614.

And where a vendee asked that the vendor's executor be enjoined from suing out the bond for the purchase-money, on the ground that the land proved to be of less acreage than described in the memorandum of sale, the injunction was granted, though the note of sale, signed by the vendee and by one of the vendor's acting executors, was only assented to by the other, the vendee having been let into possession; *Nelson v. Carrington*, 4 Mumf. 341; see *McConnell v. Brillhart*, 17 Ill. 362.

the intestate promised to join in the lease, but did not do so, the Statute of Frauds was held to be satisfied.^(h) *Semble*, a memorandum signed by the defendant will not bind if purporting to be also intended to be executed by a copromissor, but not actually so executed.⁽ⁱ⁾ That the memorandum must be executed by the party defendant is shown by the decision, that where a mortgagee wrote to the master selling under the mortgage not to let the property go for less than the amount of the mortgage, this memorandum is not evidence on behalf of one bidding at the master's request an amount fixed to cover the mortgage.^(j) An exception in a deed of land to one is an insufficient memorandum of a previous verbal sale of the timber on the land to another.^(k) A deed purporting to be from man and wife, and signed by him, but which she refused to execute, is insufficient even as to him as a memorandum under the Statute of Frauds, because it was never delivered, nothing more being done than to give the deed to a magistrate to procure the wife's signature and acknowledgment.^(l) And where A., the owner of mortgaged premises, but not the person who had created the mortgages, nor, as far as the evidence showed, in any way personally liable for the mortgage debt, conveys the land subject to the mortgages, reciting in the deed that the vendees were to assume the payment of the mortgages, and pay them as part of the consideration, it was held that there was no writing signed by the vendees under which they could be liable personally for the mortgage debt.^(m)

(h) *Heighter v. Sturman*, 1 Vern. 210.

(i) *Price v. Sturgis*, 44 Cal. 595.

(j) *Kinloch v. Savage*, 1 Speer's Ch. 470.

(k) *Buck v. Pickwell*, 27 Vt. 158; see *Craig v. Lewis*, 110 Mass. 379.

(l) *Johnson v. Brook*, 31 Miss. 17; the court saying, that "it appears to us that when the paper has never been delivered and cannot be produced by the party seeking the benefit of it, it could have no more effect with reference to the Statute of Frauds than if it had never existed; because the vendee could not have the benefit of it

without the aid of parol evidence to show its terms, and that would be to fall into the very mischief which the Statute intended to prevent." See *Parker v. Parker*, 1 Gray, 411, to the same effect; see, also, *Fletcher v. Carter*, 10 Cushing, 85.

(m) *King v. Whitely*, 10 Paige, Ch. 465.

And where W. promised to give an of acre land to a church, represented by the plaintiffs, on a condition which was afterwards fulfilled, and W. sold the land to B., reserving the above acre, it was held that a bond given by B. to

§ 359. The memorandum need be signed only by the party to be charged.⁽ⁿ⁾ It has been said generally, and apart from the Statute of Frauds, that a contract is in writing when all its terms are in writing. And if one party signs and the other accepts, it is enough.^(o) For a discussion of this ruling, see the notes to *Sweet v. Lee*, 3 M. & G. 462; the rule is the same in

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party to be
charged.

the church, agreeing to convey the acre. was good as to the defendant, to whom B. conveyed the land without notice of the reservation; *Macon v. Sheppard*, 2 Humphr. 337.

Where the plaintiff conveyed to E. S. land, taking notes and a mortgage for the price, and E. S. conveyed to the defendant by a deed poll, accepted by the latter, reciting the notes and mortgage given the plaintiff, and adding, "which said notes, etc., the said Garrison, etc. (the defendants), have assumed to pay as part of the consideration money of the purchase of the premises aforesaid," etc., etc., it was held the defendants were liable for the mortgage debt to the plaintiff; *Cushman v. Garrison*, 2 Cincin. Super. 146; see the chapter on Voluntary Performance.

(n) *Egerton v. Matthews*, 6 East, 308; *Seton v. Slade*, 7 Ves., Jr., 275; *Champion v. Plummer*, 1 B. & P. N. Rep. 254; 5 Esp., 254 (syllabus *semble* wrong); *Liverpool Borough Bank v. Eccles*, 4 H. & N. 143; *Dowell v. Dew*, 1 Yo. & Coll. 345; *Bank of British America v. Simpson*, 24 U. C. C. P. 357, citing cases; *Norman v. Molett*, 8 Ala. 546; *Kizer v. Locke*, 9 Ala. 269; *Vassault v. Edwards*, 43 Cal. 458; *Weldin v. Porter*, 4 Houst. 239; *Linton v. Williams*, 25 Ga. 391; *Esmay v. Gorton*, 18 Ill. 483; *Farwell v. Lowther*, 18 Ill. 252; *Perkins v. Hadsell*, 50 Ill. 220; *Shirley v. Shirley*, 7 Blackf. 452; *Smith v. Smith*, 8 Blackf. 209; *Cook v. Anderson*, 20 Ind. 15; *Joseph v. Moreno*, 2 La. 461; *Balch v. Young*,

23 La. Ann. 272; *Barstow v. Gray*, 3 Greenlf. 409; *Getchell v. Jewett*, 4 Greenlf. 366 (citing cases); *Cummings v. Dennett*, 26 Me. 397; *Williams v. Robinson*, 73 Me. 195; *Hanson v. Barnes*, 3 Gill & J. 368; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Dresel v. Jordan*, 104 Mass. 407; *Scott v. Bush*, 26 Mich. 420; *Morin v. Martz*, 13 Minn. 191; *Wemple v. Knopf*, 15 Minn. 444; *Williams v. Tucker*, 47 Miss. 678 (query); *Marqueze v. Caldwell*, 48 Miss. 30; *McGowen v. West*, 7 Mo. 570; *Lockett v. Williamson*, 37 Mo. 395; *Gartrell v. Stafford*, 11 No. West, 732; 12 Neb. 546; *Young v. Paul*, 2 Stock. Ch. 406; *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 444; *Russell v. Nicoll*, 3 Wend. 112; *McCrea v. Purmort*, 16 Wend. 460; *Ballard v. Walker*, 3 John. Cases, 60; *Fenly v. Stewart*, 5 Sand. 101; *Newton v. Bronson*, 3 Kern. 593; *More v. Smedburgh*, 8 Paige, 607; *National Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Miller v. Pelletier*, 4 Edwards Ch. 102; *Reynolds v. R. R.*, 17 Barb. 613; *Mirzell v. Burnett*, 4 Jones (N. Car.), 249; *Lowry v. Mehaffy*, 10 Watts, 387; *McFarson's Appeal*, 11 Penn. St. 503; *Tripp v. Bishop*, 56 Penn. St. 424; *Johnston v. Cowan*, 59 Penn. St. 275; *Kinloch v. Savage*, 1 Spear's Ch. 470; *Douglass v. Spears*, 2 Nott & McC. 209; *Sheid v. Stamps*, 2 Sneed, 172; *Patchin v. Swift*, 21 Vt. 297; *Brandon Co. v. Morse*, 48 Vt. 326; *Capehart v. Hale*, 6 W. Va. 550.

(o) *Martin v. Roberts*, 57 Tex. 567.

equity.(p) If it is part of the agreement that both should sign, there is no contract till this is done.(q) This is a question for the jury.(r) When one signs a contract of suretyship which purports to be intended to be executed by others also, he is not liable till the others have signed, and under the Statute of Frauds no oral evidence can be adduced to rebut this implication.(s) In New York by statute a memorandum of the sale of goods must be signed by both parties.(t) It was, however, said in New York, that where the purchaser signs an agreement to buy, and delivers this to the seller, who agrees verbally to sell upon the terms mentioned in the paper signed by the purchaser, the latter is bound.(u) But the signature of the party to be charged is sufficient, under the 17th section of the Statute of Frauds, in the absence of such special enactment as has just been spoken of, there being no difference between the word "parties" in that section and the word "party" in the fourth.(v) Under an act of Congress prescribing written evidence of certain contracts with the United States it was held that an order for transportation stating that the subscriber had bought a certain amount of goods from the claimant (not, however, stating the price), signed by the United States assistant quartermaster, and approved and signed by the quartermaster, is not a sufficient memorandum, because not signed by the parties.(w) In Louisiana the assent of the party sought to be charged under an auction sale of

(p) *Bowen v. Morris*, 2 Taunt. 387, *Johnson v. Mulry*, 4 Roberts. 403; and the chancery decisions in the list of authorities just given; *Creigh v. Townsend*, 24 N. Y. 59; *Champlin v. Boggs*, 19 W. Va. 251. *Parish*, 11 Paige Ch. 408; *Justice v. Lang*, 2 Roberts. 344; *West v. Newton*, 1 Duer, 283.

(q) *Liverpool Borough Bank v. Eccles*, 4 H. & N. 143 (a *dictum*), where a mortgage is drawn to be executed by both parties, and the mortgagor the only one who has duties to perform signs, it is enough; *Hipp v. Huchett*, 4 Tex. 25. (u) *Mason v. Decker*, 72 N. Y. 598 (citing *Justice v. Lang*); the subject of the sale was shares of stock.

(r) *Moore v. Campbell*, 23 L. J. Exch. 310. (v) *Morin v. Martz*, 13 Minn. 192; even in New York before the Rev. Stat. 1830; *Mactier v. Frith*, 6 Wend. 112; so in Louisiana, see *Lesseps v. Wick*, 12

(s) *Johnston v. Kimball*, 39 Mich. 187. La. Ann. 740; but see *Code Napoleon*, § 1235.

(t) R. S. Pt. II. c. vii. tit. ii. § 3; (w) *Adams's Case*, 7 Ct. of Cl. 440.

real estate, must be in writing; and where such party is the purchaser, there must also be written evidence of the assent of the owner.^(x) A memorandum set forth the contract, and began, "I *do sell*," etc.; it was objected that "this instrument is nothing but a solicitation, as it wants the consent and signature of the vendee. This consent may be shown by evidence *aliunde*, and the present case abounds in proof that the purchaser accepted the sale. He had it recorded; he entered into possession, and his heirs paid the price. It is contended this payment was made to a person not duly authorized to receive it; admitting the fact, it is still not less evidence of the assent of the purchaser to the sale."^(y)

In Scotland it has been thought that a written unilateral contract, binding one side to furnish goods, but leaving to the other an option to take them or not, is not a written obligation within a certain statute of limitations.^(z) The party to be charged means the defendant.^(a) In an early New York case it was said that the Statute of Frauds requires in certain contracts a memorandum to be signed by the parties to be charged, and if there are acts to be done by both parties, and the one who is to perform a principal part (as here, the delivery of the flour), sign, and it is accepted by the other party, there can exist no doubt but that such a contract would be mutually obligatory.^(b) And whether he be vendor or vendee is immaterial; the vendee, if defendant, must sign.^(c) So the vendor, if defendant, must sign.^(d) The vendee, if plaintiff, does not have to sign.^(e) A beneficiary under a trust need not be a party to the declaration thereof.^(f) So the wife the beneficiary in a marriage

(x) *Macarty v. New Orleans Canal Co.*, 8 Robins. 104 (citing Civil Code and Cases).

(y) *Crocker v. Neily*, 3 Martin, N. S. 583.

(z) *North British R. W. Co. v. Sligo*, Sess. Cas. 4th ser., vol. i. p. 315, referring to Statute, A. D. 1579, c. 83.

(a) *Brumfield v. Carson*, 33 Ind. 95; *Lewis v. Gray*, 1 Mass. 304; *Smith v. Smith*, 8 Blackf. 210.

(b) *Roget v. Merritt*, 2 Caines, 120.

(c) *Hatton v. Gray*, 2 Ch. Ca. 164

(A. D. 1684); *Capehart v. Hale*, 6 W. Va. 550; *O'Donnell v. Brehan*, 36 N. J. L. 257; *Newby v. Rogers*, 40 Ind. 11.

(d) *Smith's Appeal*, 69 Pa. St. 474; *Martin v. Weyman*, 26 Tex. 466.

(e) *Austin v. Wacks*, 30 Minn. 338; *Smith's Appeal*, 69 Pa. St. 480; *Fowle v. Freeman*, 9 Ves. 354; *Phillips v. Edwards*, 33 Beavan, 441; see, however, *semble, contra*, *Mix v. Balduc*, 78 Ill. 217; *Madison v. Zabriskie*, 11 La. 251.

(f) *Dale v. Hamilton*, 2 Phill. 274.

contract.(g) In Louisiana an act of subrogation (assignment) passing a claim does not have to be signed by the assignee.(h) A bill of lading accepted by the consignor, the plaintiff, though prepared by the agent of the consignee, the defendant, binds the former, though not signed by him.(i) The vendor, if plaintiff, need not sign.(j) And a purchaser has been held liable on a bond for the price, though the vendor's agreement to sell, which he is ready to fulfil, is only verbal; and it was even said that the vendee should prepare the conveyance and tender it for execution.(k) But a plea that the consideration of a promissory note in suit was the oral promise by one W., the plaintiff's assignor, to convey land to the defendant, and that W. would neither convey the land nor give a memorandum of the agreement, was held good.(l)

§ 360. A defendant may be liable by the acceptance, as vendee, of a deed which he has not signed, see *infra*, § 387, and *supra*.(m) The next point in logical order is that of the application to cases arising under the Statute of Frauds of the equitable doctrine of mutuality of remedy; but before entering upon this involved subject, it will be as well to dispose of a class of decisions made under the statute of New York (2 R. S., 135, § 8), which requires the memorandum of the sale of land to be executed by the party by whom the sale is to be made. The vendor, therefore, must under such a law sign, whether plaintiff or defendant.(n) Where the de-

Equitable doctrine of mutuality; rule in New York requiring signature by the party making the sale.

(g) *Cochran v. McBeath*, 1 Del. Ch. 188. *Smith v. Dublin, etc.*, R. W., 3 Ir. Ch. 230.

(h) *Brusle v. Thomas*, 7 La. Ann. 350.

(k) *Byers v. Aiken*, *supra*.

(i) *Cinc., etc., R. R. v. Pontius*, 19 Ohio St. 237.

(l) *Clark v. Harrison*, 5 Blackf. 303.

(m) *Kershaw v. Kershaw*, 102 Ill. 311.

(j) *Byers v. Aiken*, 5 Ark. 421; *Tatum v. Brooker*, 51 Mo. 150.

(n) *New York, etc., R. R. v. Pixley*, 19 Barb. 428; *McWhorter v. McMahan*, 10 Paige, 393; *Johnson v. Mulry*, 4 Roberts. 403 (*dictum*); *Dykers v. Townsend*, 24 N. Y. 59 (*dictum*); *Justice v. Lang*, 2 Roberts. 344 (*dictum*); *Edwards v. Farmers' Ins. Co.*, 21 Wend. 492; *Burrell v. Root*, 40 N. Y. (1 Hand)

Where a notice to treat is signed by the secretary of a corporation about to take land under eminent domain and is sent to the land owner, who alone executes a later writing fixing the price, the memorandum is sufficient;

fendant, who had sold land to the plaintiff, and had signed and sealed a written promise to buy it back at a certain price, at a certain future date, and the plaintiff wrote a letter accepting this contract and asking its fulfilment, it was held that the Statute was satisfied, and that the defendant's contract was not for the sale of land, nor, indeed, the plaintiff's, because the latter had an option in the matter.(o) The Wisconsin statute is the same as that of New York.(p) The defendant's acceptance may be shown by parol.(q) And a title-bond binds the vendee when he accepts it, though it is executed only by the vendor.(r) The law of Michigan is the same as that of Wisconsin and New York.(s) In Tennessee it has been held as matter of decision that the party to be charged means the seller of the land.(t) The vendee signing is not liable, though he is the party sued.(u) Under the law of New York, prior to the Revised Statutes, the party to be charged was the one whose signature was necessary.(v) It has been said in England that, *semble*, a signature by the vendor of land is sufficient,

496; *De Beerski v. Paige*, 47 Barb. 174, citing cases; *Earl v. Campbell*, 14 How. Pr. 333; see *Capehart v. Hale*, 6 W. Va. 549, distinguishing *National Fire Insurance Co. v. Loomis*, as being under the special statute of New York; see *Marié v. Garrison*, Report of T. W. Dwight, Referee, p. 53.

(o) *Burrell v. Root*, 40 N. Y. (1 Hand) 496, distinguishing *Townsend v. Hubbard*, 4 Hill, 351, and *McWhorter v. McMahan*, as cases where the intention was that the contract should be made mutually binding.

(p) *Dodge v. Hopkins*, 14 Wis. 639; see, also, *Hubbard v. Marshall*, 50 Wis. 327.

(q) *Lowber v. Connit*, 36 Wis. 182.

(r) *Vilas v. Dickinson*, 13 Wis. 488.

(s) *Maynard v. Brown*, 41 Mich. 298 (the vendor had an option to convey or not, and the non-mutuality of the contract was given as a reason for

dismissing his bill for specific performance).

(t) *Frazer v. Ford*, 2 Head, 464; see, also, in Virginia, *Parrill v. McKinley*, 9 Gratt. 6; see, also, in Pennsylvania, where the 4th section of the Statute of Frauds is not in force, while with some changes the first three are, *Johnston v. Cowan*, 59 Pa. St. 275; *Cadwalader v. App*, 81 Pa. St. 210; *Tripp v. Bishop*, 56 Pa. St. 428; but see *Sands v. Arthur*, 84 Pa. St. 481, and see § 367; see, *semble*, *Gartrell v. Stafford*, 11 No. West. Rep. 732; 12 Neb., 546.

(u) *Champlin v. Parish*, 11 Paige, Ch. 408; *McWhorter v. McMahan*, 10 Paige, 393; *Earl v. Campbell*, 14 How. Pr. 333; *Miller v. Pelletier*, 4 Edw. Ch. 104; *Haydock v. Stow*, 40 N. Y. (1 Hand) 370.

(v) *Earl v. Campbell*, *supra*; *McWhorter v. McMahan*, 10 Paige, 393; *Newton v. Bronson*, 3 Kern. 593; *More v. Smedburgh*, 8 Paige, 607.

but not so in the case of a seller of goods.^(w) But for the contradiction and confusion shown in the Pennsylvania decisions one would have said that under such a statute as that of New York, Wisconsin, and Pennsylvania no question could ever arise as to the application of the doctrine of mutuality of remedy.^(x)

§ 361. But under the Statute of Frauds in force in England and in most of the United States such difficulty has been encountered, and no little discordance of decision has been the result. The weight of authority is however strongly in favor of the view that this doctrine, *i. e.*, that equitable relief will not be given in favor of a complainant if for any reason corresponding relief could not have been given against him in favor of the respondent, does not apply in cases under the Statute of Frauds, if the only reason why the complainant could not be held is because he has not complied with the requirements of the Statute. The reason of this is that the Statute requires a memorandum signed by the party to be charged, and therefore by implication makes the plaintiff's signature unnecessary;^(y) and the party not signing can charge

The general rule under the Statute of Frauds as to mutuality of remedy.

(w) *Champion v. Plummer*, 1 B. & P. N. R. 252.

(x) *McWhorter v. McMahan*, *supra*; *Burrell v. Root*, 40 N. Y. (1 Hand) 496; *Lowber v. Connit*, *supra*; *Dodge v. Hopkins*, *supra*; see *post*.

(y) *Stadt v. Lill*, 9 East, 348; S. C., *sub nom.* *Stapp v. Lill*, 1 Camp. 242; *Ormond v. Anderson*, 2 Ball. & B. 370; *Allen v. Bennet*, 3 Taunt. 175; *Owen v. Davies*, 1 Vesey, Jr., 82; *Childs v. Comb*, 3 Swanst. 426; *Butler v. Powis*, 2 Coll. 161; *Newbery v. Armstrong*, Moo. & M. 389; 4 C. & P., 60; 6 Bing., 201; *Field v. Bolland*, 1 Dr. & Wa. 48 (denying *dictum* in *Lawrenson v. Butler and Martin v. Mitchell*, and relying on *Allen v. Bennet* and *Ormond v. Anderson*); *Flight v. Bolland*, 4 Russ. 301; *Bank of British America v. Simpson*, 24 U. C. C. P. 357, citing cases; *Norman*

v. Molett, 8 Ala. 546; *Gillespie v. Battle*, 15 Ala. 279; *Vassault v. Edwards*, 43 Cal. 458; Cal. C. C. (1874), § 3388; *Eaton v. Whitaker*, 18 Conn. 229; *Groover v. Warfield*, 50 Ga. 651; *Farwell v. Lowther*, 18 Ill. 252; *Esmay v. Gorton*, 18 Ill. 483; *Shirley v. Shirley*, 7 Blackf. 452; *Smith v. Smith*, 8 Blackf. 209; *Cook v. Anderson*, 20 Ind. 15; *Straughan v. R. R. Co.*, 38 Ind. 185; *Barstow v. Gray*, 3 Greenl. 415; *Getchell v. Jewett*, 4 Greenl. 366 (citing cases); *Rogers v. Saunders*, 16 Me. 97; *Cummings v. Dennett*, 26 Me. 397; *Penniman v. Hartshorn*, 13 Mass. 87; *Old Colony R. R. v. Evans*, 6 Gray, 31; *Hunter v. Giddings*, 97 Mass. 41; *Dresel v. Jordan*, 104 Mass. 407; *Scott v. Bush*, 26 Mich. 420; *Morin v. Martz*, 13 Minn. 191 (with cases cited); *Williams v. Tucker*, 47 Miss. 678; *Mar-*

the party signing.(z) The state of the law on the present point has been well stated in a Texas decision, as follows: "There can be no question," said the court, "that, according to the current of authority, the agreement or memorandum thereof required by the Statute need not be signed by both the parties, but only by him who is to be charged by it."(a) The objections to this construction of the Statute, as stated by Lord Redesdale in *Lawrenson v. Butler*, 1 Sch. & Lef. 13, are certainly forcible, and have led some courts, and at least one recent author, to reject it as unreasonable, notwithstanding the length of time it has been established by authority.(b) But seventy years have passed since Chancellor Kent said that the "weight of argument was in favor of the construction, that the agreement concerning lands to be enforced in equity should be mutually binding," but added: 'It appears, from the review of the cases, that the point is too well settled to be now questioned' (*Clason v. Bailey*, 14 Johns. 489). Surely this might be repeated now with increased force and emphasis." And it was held that a vendee is liable on a promissory note

queze v. Caldwell, 48 Miss. 23; *Reynolds v. O'Neill*, 11 C. E. Green, 225; *Young v. Paul*, 2 Stock. Ch. 406; *Ballard v. Walker*, 3 John. Cases, 60; *Clason v. Bailey*, 14 Johns. 486; *Worrall v. Munn*, 1 Seld. 239 (citing cases); *Russell v. Nicoll*, 3 Wend. 112; *M'Crea v. Purmont*, 16 Wend. 460; *Davis v. Shields*, 26 Wend. 347; *Reynolds v. R. R.*, 17 Barb. 613; *Woodward v. Aspinwall*, 3 Sandf. 275; *Fenly v. Stewart*, 5 Sandf. 105; *National Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Hunter's Case*, 1 Edw. Ch. 5; *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 444; *Steele v. Taft*, 22 Hun, 454; *Mirzell v. Burnett*, 4 Jones (N. Car.), 249; *Lowry v. Mehaffy*, 10 Watts, 387; *McFarson's Appeal*, 11 Pa. St. 503; *Tripp v. Bishop*, 56 Pa. St. 424; *Johnston v. Cowan*, 59 Pa. St. 275; *Smith's Appeal*, 69 Pa. St. 474; *Cadwalader v. App*, 81 Pa. St. 210; but see *post*; *Douglass v. Spears*, 2

Nott & McC. 409; *Kinloch v. Savage*, 1 Speer's Ch. 470; *Sheid v. Stamps*, 3 Sneed, 172; *Patchin v. Swift*, 21 Vt. 297; *Brandon Co. v. Morse*, 48 Vt. 326; *Creigh v. Boggs*, 19 W. Va. 251; *Cheney v. Cook*, 7 Wis. 423; *Hilliard on Vend.* ii. 158; *Sug. Vend.* i. 217 n. (x); *Wats. Eq.*, 87; *Fry, Spec. Perf.*, 137; *Waterm. Spec. Perf.*, § 196, etc.; 2 *Lead. Ca. Eq.* (4th Am. ed.), 1091-9.

(z) *Nesham v. Selby*, 41 L. J. Ch. 551; 7 L. R. Ch., 407; *Palmer v. Scott*, 1 Russ. & M. 394; *Bailey v. Ogden* 3 Johns. 418; *Worrall v. Munn*, 1 Seld. 239; *Brooklyn Oil Refinery v. Brown*, 3 How. Pr. 446.

(a) *Crutchfield v. Donathon*, 49 Tex. 694, citing many authorities.

(b) Citing *Bing. on Sales of Real Prop.*, p. 434 *et seq*; *Thomas's Executrix v. Trustees of Harrodsburg*, 3 Marsh. 299; *Frazer v. Ford*, 2 Head, 464.

given for the price of land when the vendor shows a good consideration for the note by tendering a deed. It has also been said that where the contract itself is mutual, the fact that one party has secured evidence of a more conclusive character is not material, and as to this distinction see *infra*, § 363.(c) The general rule prevails as well under the 17th section of the Statute of Frauds as under the 4th, though the phrase in the former is "parties" and in the latter "party." (d) This doctrine is, as has been suggested, peculiar to the Statute of Frauds, and is owing to the express wording of the latter. Apart from the Statute, the plaintiff must show that he is bound if he wishes to bind the defendant (e) It has, however, been held that where under a verbal sale of land the vendee, a married woman, partly performed, the vendor cannot refuse to specifically perform on the ground of want of mutuality, because a married woman's disability can only be set up by herself. (f) So it has been held that in the case of a contract with an infant, the latter's claim cannot be resisted on the ground of a want of mutuality. (g) These decisions rest, however, on the peculiar care which both law and equity show to persons not *sui juris*, allowing them to repudiate their obligations, but at the same time holding the other party if *sui juris* to his promise. The fact that the plaintiff attempts to execute the memorandum but fails to do so effectually, does not relieve the defendant who has properly executed. (h) It has been urged as a reason for denying the conclusion reached in *Wain v. Warlters*, and the long line of decisions which follow it, holding that the memorandum must show the consideration of the contract, that logically it would seem that then both parties should be required to execute the memorandum. (i)

(c) *Cook v. Anderson*, 20 Ind. 17; allowed to recover, though the defendant had executed the deed. see below.

(d) *Clarke v. Gardiner*, 12 Ir. C. L. 477.

(f) *Chamberlin v. Robertson*, 31 Iowa, 412.

(e) *Flight v. Bolland*, 4 Russ. 301; *Gage v. Jaquette*, 1 Lans. 210; *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 19; 43 L. J. Ex., 9 (the plaintiff was a corporation who had not properly executed the deed, and was not

(g) *Mirzell v. Burnett*, 4 Jones (N. Car.), 252.

(h) *Dresel v. Jordan*, 104 Mass. 412.

(i) *Smith v. Ide*, 3 Vt. 295. It was said in *Laythoarp v. Bryant*, 2 Bingh. N. C. 735, that the objection of non-

The question of non-mutuality being a bar to recovery, has been introduced as a further disturbing element in a problem much complicated already: whether, namely, a parol express contract invalid within the Statute of Frauds can be used as a defence to an implied contract as to the same subject arising from the relations of the parties, as where the defendant agreed to convey land to the plaintiff in consideration of services, and the latter having served for less than the agreed time, sued on a *quantum meruit*, it was held that the defendants not being bound by the oral contract, the plaintiff was not, and could leave at any time and recover for services actually rendered.(j) It has been held, however, that there is no inconsistency between these two doctrines, the court saying that the mutuality is complete, and if not, it was the plaintiff himself who had impaired it, the defendant being ready to carry out the parol contract.(k) The following are some examples of the application of that exception to the doctrine of mutuality which occurs under the Statute of Frauds: Where a plaintiff assented to a certain oral term being added to a writing, of which specific performance was sought, the defendant cannot object, though he could not have enforced the term as against the plaintiff, and the latter indeed admitted that the defendant's version of the agreement was correct.(l) Where the buyer at auction signs a memorandum binding himself, he is bound to the auctioneer for the latter's fees, though neither the auctioneer nor the owner signed, but the defendant took in pursuance of the contract a conveyance from the owner.(m) Where W. and J., the defendants, wrote the plaintiff that they had credited him with a certain sum in consideration of a contract to convey certain property; the plaintiff signed no writing to bind himself to convey. He, *semble*, furnished an abstract and a draft of conveyance, and afterwards sued for specific performance. It was held that the

mutuality was not raised, as it might have been in *Wain v. Warlters*.

(j) *Crawford v. Parsons*, 18 N. H. 295.

(k) *Mitchell v. McNab*, 1 Bradw. 300.

(l) *Martin v. Pycroft*, 2 De G. M. & G. 794; 22 L. J. Ch., 95 (overruling *Parker v. C.*, 21 L. J. Ch. 448, who rested his decision on the ground of the want of mutuality.

(m) *Muller v. Maxwell*, 2 Bosw. 359.

want of mutuality was no bar, but that under the facts there had been too long a delay in bringing the bill.(n) A memorandum, signed by the plaintiff and the defendant, but not by the plaintiff's wife, is sufficient, though the suit was brought by both the plaintiff and his wife.(o) Where the memorandum was signed by the vendor, a stipulation contained in the writing that if the title was unsatisfactory, the money paid by the vendee was to be returned, does not cause the memorandum to be invalid because of non-mutuality of remedy.(p) A memorandum signed by one partner on behalf of a firm of vendors, plaintiffs, is sufficient, the defendant having signed.(q) A memorandum in the first person is not invalid for want of mutuality.(r) So a memorandum, "John Bleakley agrees with J. R. Bridges" (the defendant's testator) "to take the property."(s)

§ 362. The assent of the party charging is shown by the action brought.(t) An optional or unilateral contract is made mutual by the filing of a bill for specific performance.(u) A plaintiff, seeking the aid of a court of equity to enforce an entire agreement, signed only by the party sought to be charged with it, is not put to prove that he accepted it, the filing of the bill *primâ facie* sufficiently shows his acceptance, but the defendant is at liberty to repel the claim of the plaintiff by showing that at the time he declined to accept it.(v) The grounds upon

Mutuality
shown by
action
brought.

(n) *Williams v. Williams*, 17 Beav. 215.

(o) *Slater v. Smith*, 117 Mass. 98.

(p) *Reynolds v. O'Neill*, 11 C. E. Green, 225.

(q) *More v. Smedburgh*, 8 Paige, 607; see *McConnell v. Brillhart*, 17 Ill. 362.

(r) *Coles v. Trecothick*, 9 Ves., Jr., 242.

(s) *Bleakley v. Smith*, 11 Sim. 150; see *Cadwalader v. App*, 81 Pa. St. 210; *Corson v. Mulvany*, 49 Pa. St. 98.

(t) *Coleman v. Upcot*, 5 Vin. Abr. p. 528, pl. 17; *Martin v. Mitchell*, 2 J. &

Walk. 427 (citing *Gaskarth v. Lowther*); *Williams v. Williams*, 17 Beav. 215; *Heys v. Astley*, 3 N. R. 19; 12 W. R., 9 L. T., N. S., 356; *Sams v. Fripp*, 10 Rich. Eq. 459; *Ives v. Hazard*, 4 R. I. 27 (citing cases); *Ivory v. Murphy*, 36 Mo. 534 (citing cases); *Evans v. Williamson*, 79 N. Car. 90; *Estes v. Furlong*, 59 Ill. 300; *Brusle v. Thomas*, 7 La. Ann. 350; *Vassault v. Edwards*, 43 Cal. 463 (citing many cases); *Worrall v. Munn*, 1 Seld. 239; *Steele v. Taft*, 22 Hun, 454.

(u) *Cooper v. Carlisle*, 2 C. E. Green, 530.

(v) *Boys v. Ayerst*, 6 Madd. 324.

which courts of equity have proceeded appear to be, that the Statute of Frauds, as decided in the courts of law, requires only the signature of the party to be charged to be legally binding upon him; and equity, finding a contract legally binding, will decree its performance. Where the contract is binding at law, therefore, the want of mutuality is no objection.^(w) In a Louisiana case it was said that while a retrocession (*semble* a surrender or dedication) signed by the purchaser did not bind the seller till accepted by him, *semble* a suit might be such an acceptance if it went to enforce the contract.^(x) And in another case it was said, "the parties in whose favor the stipulations were made so far from considering that they are not obligatory invoked the aid of the agreement in the suit, and found their claims in part upon it."^(y) Apart from the Statute of Frauds, the decided weight of authority seems to establish that, where the complainant in suing binds himself in any way to the satisfaction of the chancellor for the performance of his part of the contract, the defendant cannot raise the difficulty of want of mutuality.^(z) Where there have been circumstances of equitable part performance the courts have, in some instances, taken hold of these to evade the question of the application of the mutuality rule to the Statute of Frauds. Thus, where the plaintiff has performed his part of the contract, it was held that the other party signing was bound.^(a) And where one before marriage executes a bond, making a certain marriage settlement, and both the husband and wife act under it, and after his death she continues to carry it out, it was held that her heir could not attack the bond on the ground that she had not signed it, because one party having signed, both parties have acted thereunder, and the Statute of Frauds does not apply.^(b) Where the plaintiff performs his part, the defendant signing is bound, whether the mutuality rule applies or not.^(c) The party to an agreement within the

(w) Rogers v. Saunders, 16 Me. 97.

(x) Municipality No. One v. Barnett, 13 La. Rep. 347.

(y) Connolly v. Autenrieth, 4 La. Ann. 163.

(z) See Story's Eq. Jur., p. 729 (12th

ed.), n. 2; see Adams's Eq. (7th ed.), p. *82, n. 3; Bisp. Eq., § 377.

(a) Laniug v. Cole, 3 Green, Ch. 229.

(b) Archer v. Pope, 2 Ves., Sr., 523.

(c) Straughan v. R. R., 38 Ind. 185.

Statute of Frauds, who has not signed the memorandum, but who under it is bound by certain stipulations, may, if ready to perform the latter, have reformation of the instrument in a proper case.^(d) In a case where the point of non-mutuality was raised the court said: Whatever weight there might have been in this objection at first, it vanished the moment the house was built, and Collins took possession. It could be enforced as well by the vendor as by the vendee. It was as well an agreement to buy as to sell.^(e) Where the defendants signed an agreement to build a dam and partly performed it, and were partly paid, the objection that the defendants only had executed the memorandum was held not to prevail.^(f) In other cases the rule has been laid down that both parties must sign, but that equitable part performance by a vendee plaintiff, for example, will supply the place of the latter's signature.^(g) And where, under an agreement for the sale of goods claimed to be invalid, because not signed by the party seeking to charge, one party who had signed the agreement gave and the other party accepted certain promissory notes as provided in the agreement, it was not error for the court to leave it to the jury to say whether there had not been such an execution of the agreement as would take it out of the Statute of Frauds, the suit being on one of the notes.^(h)

§ 363. There is a distinction which is important, and the disregard of which has helped to further involve the disputed doctrine now under consideration, and that is the difference between the want of mutuality of remedy, which arises solely from the failure of the plaintiff to sign the memorandum required by the Statute of Frauds, and a non-mutuality inherent in the contract itself, one party binding himself and the other promising nothing. Where both sides of the proposed agreement are executory and only one party is bound, there is, all other con-

Want of
mutuality
of remedy,
or want of
mutuality
of contract.

(d) *Thompson v. Marshall*, 36 Ala. 513.

(e) *Collins v. Vandever*, 1 Iowa (Clarke), 576; see *Willetts v. Sun*, etc., Ins. Co., 45 N. Y. 45.

(f) *Reedy v. Smith*, 42 Cal. 245.

(g) *Mix v. Balduc*, 78 Ill. 217; and see *Cox v. Cox*, 26 Gratt. 311.

(h) *Weightman v. Caldwell*, 4 Wheat. 85.

siderations apart, no contract at all; where the contract is unilateral the question is whether the acceptance can be proved by parol; and, lastly, where the contract itself, though fully mutual, is within the Statute of Frauds, and the *writing* shows a promise only by one party, it is because there is no written evidence signed by any one, even the defendant, of a promise made by the plaintiff, and not because the latter has not signed that he cannot recover. All contracts, apart from the Statute of Frauds, must be mutual as a rule.⁽ⁱ⁾ The exceptions to this doctrine, not depending upon the Statute of Frauds, need not be considered further than above suggested. In an Indiana case already cited,^(j) it was said that the contract in suit was mutual in itself, but that one party had secured evidence of a more conclusive character than the other. Where the memorandum read, "I, Samuel Kisson, certify that I sell to Peter Gilmore," and Gilmore accepted the memorandum and made a part payment, the evidence was sufficient.^(k) A written promise signed by the defendant to pay rent, but containing no promise on the plaintiff's part, satisfies the Statute of Frauds, but cannot be sued on as a *lease*.^(l) Where the defendant by a sufficient memorandum made an offer of purchase of land, no question of mutuality was considered to have arisen, as the defendant took a conveyance of the land, and this though on oral proof a larger price was sought to be recovered than that reserved in the deed.^(m) In a Kentucky decision it was said that "this case is within the rule recognized by this court repeatedly; that to enable either party to compel a specific execution the contract must be *mutually* binding on each. (*Boucher v. Van Buskirk*, 2 Marsh. 345; *Allen v. Roberts*, 2 Bibb, 98; *New. on Contracts*, 154.)"⁽ⁿ⁾ In a Vermont case the non-mutuality was made a ground of de-

(i) *Lewallen v. Overton*, 9 Humph. 146; see *Bleakley v. Smith*, 11 Sim. 76; see *Hopkins v. Roberts*, 54 Md. 150, *supra*, and *Coles v. Trecothick*, 9 316; see *Davis v. Flagstaff Co.*, 2 Utah, Ves., Jr. 242, *supra*.
92, for a contract not binding, because not mutual in its terms.

(j) *Cook v. Anderson*, 20 Ind. 18 (citing cases).

(k) *Simonson v. Kissick*, 4 Daly,

(l) *Browning v. Walbrun*, 45 Mo. 478.

(m) *Rochleau v. Bidwell*, Dra. Rep. U. C. 366.

(n) *Jones v. Noble*, 3 Bush, 695.

fence, but with an obscured perception of the real difficulty counsel urged the defect as being a want of consideration; the defendant had promised plaintiff by letter that if he would continue as counsel for the defendant's brother he, the defendant, would guarantee the fee. The court going directly to the point said: "But it is claimed again that the consideration should appear in writing in order to give validity to the guaranty. This must either mean that the acceptance of the defendant's proposition must be in writing, or a correlative undertaking on the part of the plaintiff to render future services must have been in writing. We can readily understand that this might be required in some cases, as when the guaranty itself did not embody substantially the material and effective terms of the contract, and where resort to parol evidence should be necessary in order to show what the contract was in its terms and effect. But we do not understand that this has ever been required, when all that is to be done by the other party is merely to accept the proposition in the terms in which it is made, and to perform the consideration either by paying or doing the thing proposed. In the present case the services thereafter to be rendered constitute the consideration, and this is clearly indicated on the face of the defendant's proposition."^(o) Where the action is upon a promissory note given by the vendee, although it may not be such a memorandum as satisfies the Statute of Frauds, the maker cannot avoid the note he has given, because he has omitted to bind the vendor, who is ready to do his part.^(p) But where the consideration of a promissory note was the conveyance by a third party of certain land to the maker of the note, and the third party would neither convey nor put into writing his oral promise to do so, the defence of want of mutuality and failure of consideration will be sustained.^(q) It has even been

(o) *Roberts v. Griswold*, 35 Vt. 496.

(p) *Crutchfield v. Donathon*, 49 Tex. 694, citing *Rhodes v. Storr*, 7 Ala. 347, and *McGowen v. West*, 7 Mo. 569; see *Weightman v. Caldwell*, 4 Wheaton, 87, *supra*.

(q) *Clark v. Harrison*, 5 Blackf. 303; see *Martin v. Mitchell*, 2 Jac. & W. 426; where Sir Thomas Plumer asked whether the party having signed might not recede if the other would not sign, or otherwise bind himself.

held that the mutuality of the contract can be shown *dehors* the memorandum.(*r*)

§ 364. The next class of cases are those where the evidence itself shows that there was no mutuality of agreement, a defect, as has been said, altogether different from non-mutuality merely of remedy. Thus, where one W. B. signed an agreement to work for the plaintiff, and for no one else, etc., the plaintiff not having signed the memorandum, and not having agreed, *semble*, even by parol, to retain W. B. as his servant, the defendant is not liable for enticing the latter away.(*s*) So, where the defendants agreed between themselves by a written contract to employ the plaintiff, and the latter was not a party even to the oral contract evidenced by the writing, the defendants are, for want of mutuality, not liable.(*t*) A written contract to sell land at a certain price does not bind the vendor because the other party did not agree (*semble* even by parol) to take the land.(*u*) Nor is the vendee bound under such circumstances, having promised nothing.(*v*) As may be seen in the chapter on "Validity," an invalid contract within the Statute has, as a general rule, been held to furnish no consideration for a promise; and this in one instance was rested on the ground of the lack of mutuality in the agreement.(*w*) An optional or unilateral contract is made mutual, as has already been said, by bringing suit;(x) but, perhaps, acceptance is enough. There are some decisions which have sustained a defence on the ground of non-mutuality, where the memorandum under the Statute of Frauds showed an obliga-

(*r*) *Ives v. Hazard*, 4 R. I. 26.

(*s*) *Sykes v. Dixon*, 1 P. & D. 468; 9 A. & Ell., 693.

(*t*) *Briggs v. Smith*, 4 Daly, 113.

(*u*) *Bean v. Burbank*, 16 Me. 460.

(*v*) *Stetson v. Patten*, 2 Me. 360.

As another example of a non-mutual contract, see the case cited below; *Knox v. Haralson*, 2 Tenn. Ch. 236; and see *Bromley v. Jefferies*, where specific performance was refused of a

covenant on the ground of non-mutuality, the covenantee being bound to nothing (but see Reporter's note); see, also, *Vassault v. Edwards*, 43 Cal. 463, distinguishing *Cooper v. Pena*, 21 Cal. 403, as a case where the non-mutuality did not arise from the failure to sign, but was inherent in the contract itself.

(*w*) *Krohn v. Bantz*, 68 Ind. 278.

(*x*) *Cooper v. Carlisle*, 2 C. E. Green, 530.

tion merely in the defendants.(y) Where the vendors signed a memorandum of sale of land, which expressed that the vendees were "to have the refusal ten days from date," it was held that the vendor's signature was enough; that the vendee's option to take might be proved by parol, and that the doctrine of mutuality did not apply.(z) In Michigan, it has been decided that a memorandum which showed that the vendor had an option to convey or not, showed a non-mutuality of contract, and could not avail under the Statute of Frauds.(a) In a prior case, it has been said that, where the remedy was not mutual, specific performance would not be decreed; but the point decided was that the memorandum, though reciting an obligation on the part of one only, being signed by both parties, bound both; and it would seem that the acceptance by the grantee of a deed executed only by the grantor, bound the latter to the covenants therein.(b)

§ 365. Before taking up those cases which doubt or deny the statement of law contained in the last few pages, it may be well to recapitulate what has been said. We have then the following propositions: I. Apart from the Statute of Frauds, the rule in equity is that recovery against the defendant will not be given when the court would not be able to hold the plaintiff to his part of the contract. II. That even in equity, when the plaintiff performs or satisfies the chancellor of his readiness to perform, he may recover.(c) III. That the defect is one relating to the remedy solely, and is of importance only when a chancellor is asked by one party for a strong measure peculiar to equity, and the doubt which arises is whether the same grace can equally be accorded to

General
proposi-
tions.

(y) *Corbitt v. Salem Co.*, 6 Or. 405; 299. The memorandum was, however, *Butler v. Thomson*, 11 Blatch. C. C. 535, reversed in 92 U. S. 412, on the ground that the memorandum did show an agreement by both parties.

(z) *Smith's Appeal*, 69 Penn. St. 474, citing cases; see *Bisp. Eq.*, § 377, citing *Smith's Appeal* and *Corson v. Mulvany*.

(b) *Corson v. Mulvany*, 49 Penn. St. 98; see *Cadwalader v. App*, 81 Penn. St. 210, and see § 367.

(a) *Maynard v. Brown*, 41 Mich.

(c) *Grove v. Hodges*, 55 Pa. St. 515.

the other party should the latter need it.(d) IV. That the question of mutuality of remedy does not arise in law at all, and while the non-mutuality of remedy in equity may be plain, yet the mutuality of right and the recovery thereon at law may remain clearly undisturbed in both parties.(e) V. That under the Statute of Frauds, which only requires a signature by the party to be charged, the equitable rule of mutuality of remedy does not prevail.(f) VI. But the non-mutuality must merely relate to the remedy, and arise solely from the plaintiff's failure to sign, so that, even under the Statute of Frauds, the contract in itself must be mutual.(g) VII. That the memorandum signed by the defendant must show the plaintiff's obligation as well as that of the defendant.(h) VIII. Except where the memorandum shows a unilateral contract, and there is no extrinsic evidence that the plaintiff was under any obligation other than to accept the defendant's promise.

No practical injustice results from the want of mutuality of remedy, because neither party will be compelled to perform his part till the other has performed or has satisfied the court that he will perform: thus, if the vendor sues at law for the purchase-money without having conveyed, there is failure of consideration, and this will be allowed as an equitable defence in the common-law action, or the execution will be stayed or enjoined until the plaintiff's performance; if the vendor proceeds in equity it will be for a decree compelling the vendee to take the land and pay for it. On the other hand, if the vendor is sued for the land in ejectment, or specific performance is sought against him, either payment of the price will be held a prerequisite, or the vendor will have his action at law for the money, and, under the law of some states, his vendor's lien; and while it is easily to be imagined how a suitor might fail between these various remedies, yet the cases seldom or never show such a result.

(d) *Young v. Paul*, 2 Stock. Chan. 406, denying *Martin v. Mitchell*. National Savings Bank, *Brady's Case*, 15 W. R. 753; *Geiger v. Green*, 4 Gill,

(e) *Young v. Paul*, *supra*.

(f) See above.

(g) *McConnell v. Brillhart*, 17 Ill. 360; *Mix v. Balduc*, 78 Ill. 218; 3 C. & P., 289; 2 M. & P., 86 (per Burroughs, J.).

Springle v. Morrison, 3 Litt. 53; (*Re*) (h) *Burnet v. Bisco*, 4 Johns. 236.

§ 366. As might be expected, where there has been so much difference of opinion, the law, even when settled, has been accepted with expressions of doubt. In a modern case, for example, it was said that the allowance of specific performance upon the evidence of letters, which bound one party and not the other, had gone far enough.⁽ⁱ⁾ In an older case Sir Thomas Plumer thought that the party signing might recede, if the other would not sign or otherwise bind himself.^(j) It has been said that the non-mutuality arising from the plaintiff's not signing was not a defence in itself; it might be a circumstance with other objections.^(k) And Lord Redesdale's *dictum*, in *Lawrenson v. Butler*,^(l) was referred to in one of the *Veseys*, and not passed upon.^(m) So Lord Chancellor Manners said that an eminent judge of the Irish Chancery shared the doubt expressed in *Lawrenson v. Butler*.⁽ⁿ⁾ In a Wisconsin case the general rule was followed reluctantly, and on authority.^(o) Chancellor Kent, who was, perhaps, the one most instrumental in settling the course of American decision in favor of the now established English view, said, in *Benedict v. Lynch*,^(p) that at that time the recent cases did not favor decreeing specific performance of a contract signed only by the party to be charged, but he admitted that the prior authorities were the other way; and in a later case he still approved of Lord Redesdale's view, but finally he adopted, on authority,^(q) the doctrine that the failure of the plaintiff to sign the memorandum, under the Statute of Frauds, will not prevent his recovery on the ground of want of mutuality.^(r) Lord Redes-

The rule, that under the Statute of Frauds the doctrine of mutuality does not prevail, denied.

(i) *Nesham v. Selby*, L. R. 7 Ch. 407; 41 L. J. Ch., 551.

(j) *Martin v. Mitchell*, 2 J. & Walk. 427.

(k) *Backhouse v. Mohun*, cited in 3 Swanst. 434, n.; as delay in bringing suit, *Francis v. Love*, 3 Jones's Eq. 322.

(l) See *infra*.

(m) *Huddleston v. Briscoe*, 11 Ves., Jr. 591.

(n) *Ormond v. Anderson*, 2 B. & Bea. 370.

(o) *Hodson v. Carter*, 3 Chand. 234; 3 Pinn., 213.

(p) 1 Johns. Ch., 373, citing for the old view *Seton v. Slade*, and *Fowle v. Freeman*, and instancing for the opposite opinion *Lawrenson v. Butler*, *Champion v. Plummer*, and *Huddleston v. Briscoe*.

(q) *Bailey v. Ogden*, 3 Johnson, 418; and see a *dictum* in *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 280 (citing several cases).

(r) *Clason v. Bailey*, 14 Johns. 486.

dale, by a *dictum* already referred to, and which has received great consideration in later decisions, said that the equitable rule of mutuality should apply under the Statute of Frauds to as great a degree as in other cases.^(s) The earliest authority is a doubtfully reported case in Bunbury.^(t) Besides the expressions of Chancellor Kent's opinion, Lord Redesdale has been followed in some other American cases.^(u)

§ 367. While the law of Pennsylvania on the present subject is now entirely unsettled, the latest decisions and *dicta* appear to follow Lord Redesdale rather than the preponderance of both American and English authority. Five cases^(v) have been already given as supporting the general opinion, and one of them decided the point so directly and so recently^(w) that it is remarkable that still later rulings should have again opened the whole subject.^(x) Before taking up the earlier cases in their chronological order, we may now consider more in detail the four latest authorities just referred to. The first in importance is *Tripp v. Bishop*, for it is full upon the point, incapable of being explained away, and a ruling which has never been questioned,

(s) *Lawrenson v. Butler*, 1 Sch. & Lef. 13 (see authorities cited in the reporter's note); the agreement was mistakingly executed; it had been intended to be mutual.

(t) *Armiger v. Clark*, Bunb. 111.

(u) *Thomas v. Trustees of Harrodsburg*, 3 Marsh. 299; *Boucher v. Van Buskirk*, 2 A. K. Marsh. 346, where the contract seems to have been unilateral; *semble*, also, *Linn Boyd Co. v. Terrill*, 13 Bush, 464; *Sutherland v. Parkins*, 75 Ill. 340; *Geiger v. Green*, 4 Gill, 476 (citing cases); but here the contract itself was not mutual; *Duvall v. Myers*, 2 Md. Ch. 406, distinguishing *Moale v. Buchanan*, as a case of part performance (the contract related to personal property); *De Cordova v. Smith*, 9 Tex. 144; *Frazer v. Ford*, 2 Head, 464 (a case distinguishable, perhaps, on the ground that the memo-

randum professed to bind several vendors, but one only signed; and that therefore the vendee, defendant, gave his assent only to a contract binding all the vendors, and that if they all did not sign he was not bound; nor would their subsequent signing bind him, if in the interval he withdrew his assent); so in Louisiana; *Miltenberger v. Canon*, 10 Martin, 87; and, *semble*, in one decision in New York; *Calkins v. Falk*, 1 Abb. App. Dec. 292.

(v) *Lowry v. Mehaffy*, 10 Watts, 387; *McFarson's Appeal*, 11 Pa. St. 503; *Johnston v. Cowan*, 59 Id. 275; *Tripp v. Bishop*, 56 Id. 424; and *Smith's Appeal*, 69 Id. 474.

(w) *Tripp v. Bishop*, 56 Pa. St. 424.

(x) *Meason v. Kane*, 67 id. 126; *Sausser v. Steinmetz*, 88 id. 324; *Sands v. Arthur*, 84 id. 481; 4 W. N. Cas. (Phila.), 501.

even in the later opinions, whose *dicta* are inconsistent with it. The facts were that the vendor, who sued for an unpaid balance of the price of land sold, had executed a memorandum of sale and delivered it to one of the defendants, who took it as requested by the vendor to the latter's agent, with instructions to the agent to prepare a deed to be delivered when the full price was paid; the vendor afterwards executed this deed, which was approved by the vendees, and left it with the vendor's agent to be held till full payment; and the court held that the vendor, the party making or creating the estate, having executed the memorandum which had been accepted by the vendee, the mutuality rule did not apply, and that the vendee was bound. This it will be seen agrees with the law as laid down in New York and Wisconsin, where, as in Pennsylvania, the memorandum is to be the act of the party making or creating the estate, and was supposed to have settled a dispute of many years' standing. *Grove v. Hodges*(y) was a decision scarcely less emphatic in its language, though, owing to the fact that the deed therein tendered was actually accepted, thereby creating a new relation between the parties, which, even apart from the Statute of Frauds, bound them both, the case is less decisive than *Tripp v. Bishop*, where the deed being in escrow, the parties were bound only as having complied with the Statute. In *Grove v. Hodges* it was said that a person who accepts a written contract is bound without signing, even though the contract was mutually executory, and though the remedy of each party is different, the one being on the deed, the other on the parol contract. It was not long, however, before the decisions of the Supreme Court of Pennsylvania began to exhibit a tendency to revert to the old rule of mutuality which, once threatening to become the law, had been overruled in the series of cases, beginning with *Lowry v. Mehaffy* and ending with *Tripp v. Bishop*, so that *Wilson v. Clarke* (y¹) and *Parrish v. Koons* seem now about to be reestablished. A late and most pointed expression of opinion is to be found in *Sands v. Arthur*, where the successful defence of the case was rested on the want of mutuality, and

(y) 55 Pa. St., 515.

(y¹) 1 W. & S., 554.

Wilson *v.* Clarke and Meason *v.* Kane were cited; and the facts on which the decision might have been rested, viz., that the memorandum was never accepted by the vendee, being expressly disavowed by him as not stating the contract truly, was not alluded to by the court; as will be seen hereafter, the memorandum even when required to be made only by the party to be charged, or by the party making or creating the estate, must be accepted by the other party and acknowledged by him to contain a full and true statement of the agreement. Arthur, the plaintiff, sued for his wages, and the defence set up was a parol agreement that he should take his pay in part payment of certain lands sold by parol by the defendant to him, and the only evidence of the agreement was a deed executed by the defendant, tendered by him to the plaintiff, and refused by the latter because not conveying all the land agreed to be given. A *dictum* in Meason *v.* Kane gives support to the view afterwards more distinctly stated in Sands *v.* Arthur. The early decisions on this point, as has already been stated, favor the same contention. The first case is Wilson *v.* Clarke, in which Judge Gibson, speaking in what he acknowledges to be a *dictum*, enters into a discussion of the subject, alludes to Chancellor Kent's then recently expressed doubts, criticizes the cases overruling the *dictum* in Lawrenson *v.* Butler, expresses his sympathy with the latter ruling, and maintains the opinion that the absence of the 4th section of 29 Car. II., c. 3, from the Pennsylvania statute takes away the only reason for making the exception to the general rule of mutuality. It is hard to understand how any one can reason that the first section of the statute which requires an execution of the memorandum by the *party making or creating the estate* should necessitate an execution by both parties, while the fourth section, which requires an execution by the *party to be charged*, may be satisfied without both parties signing, and though it would appear to some(z) that such phraseology as that of the first section should prevent any doubt arising on this point, yet the views expressed in Wilson *v.* Clarke were followed in Parrish

(z) See above; see § 400.

v. Koons,^(a) which followed the *dictum* of the Supreme Court by an actual decision. *Dicta* follow the same current in other cases,^(b) and two cases exhibit the difficulties peculiar to unilateral contracts.^(c) In the very latest case on the subject the pendulum seems to have swung back to *Tripp v. Bishop*; and it is said that "it is clear that the defendant accepted the contract in parol, and this was competent, for the Statute does not require the vendee's signature to make the agreement mutually binding."^(d)

(a) 1 Parsons, Eq. Ca. 84 (District Court of Philadelphia), (distinguishing *Lowry v. Mehaffy* as a case of part performance).

(b) *Patton v. Develin*, 2 Phila. 103; *Dodds v. Dodds*, 9 Pa. St. 315; *McDowell v. Oyer*, 21 Pa. St. 422 (*semble*).

(c) *Smith's Appeal*, 69 Pa. St. 474; *Corson v. Mulvany*, 49 id. 98.

(d) *Swisshelm v. Swissvale Laundry Co.*, 11 Pitts. L. J., N. S., 84; 95 Pa. St., 367, citing *Tripp v. Bishop* and *Smith's Appeal*.

CHAPTER XV.

THE EXECUTION OF THE MEMORANDUM BY AN AGENT.

§ 368. Memorandum by an agent.

§ 369. Who may and who may not be agent. One of the parties.

§ 370. One agent for both parties; brokers.

§ 371. Nature and requisites of an agent's authority; generally.

§ 372. In whose name the memorandum shall be.

§ 373. Brokers' memoranda; bought and sold notes.

§ 374. Broker's memorandum generally.

§ 375. Entry in broker's book.

§ 376. Bought and sold notes differing from the book, or from each other.

§ 377. Oral authority to an agent generally; authority by deed generally and to convey land.

§ 378. Unsealed authority when good as to land, etc.; agent making deed when parol writing would have been enough.

§ 379. Oral authority to contract.

§ 380. The rule denied.

§ 381. Oral authority to make various contracts; dower; chattels; guaranties; marriage; partnership.

§ 382. Ratification.

§ 383. Ratification by deed generally; partnership-transaction.

§ 368. THE memorandum under the Statute of Frauds may be made by an agent.^(a) The memorandum executed by the agent may be done under such circumstances as to make it the principal's own act; thus, where a proposal of marriage-settlement is drawn and signed by the intended husband's solicitor, addressed to the intended wife, and is handed to the latter by the intended husband himself, the Statute of Frauds is complied with.^(b) In Kentucky, by General Statute, ch. 22, § 20, it is provided that the authority of an agent to bind his principal as surety must be in writing, and execution by the agent in the presence of the principal is not sufficient.^(c)

(a) *McComb v. Wright*, 4 Johns. Mich. 382; *Creigh v. Boggs*, 19 W. Va. Ch. 661; *New Haven Co. v. Quintard*, 251.

1 Sweeny, 102; *McMillen v. Terrell*, 23 Ind. 165; *McConnell v. Brillhart*, 17 Ill. 360; *Hammond v. Harrison*, 21

(b) *Gillespie v. Grover*, 3 Grant (U. C.), 571.

(c) *Billington v. Commonwealth*, 79 Ky. 400.

§ 369. One of the contracting parties cannot be the agent to make the memorandum. *(d)* A grantor conveying subject to a lease cannot make a memorandum of the lease to bind the grantee. *(e)* A bill of goods made out by the plaintiff's agent, who sold them to the defendant, is not a sufficient memorandum under the Statute of Frauds. *(f)* Where, however, the memorandum was made by the clerk of one party, and the other party claimed under this writing as against a stranger, the evidence was considered sufficient. *(g)* But if the memorandum is signed by the defendant it is sufficient, though written by the plaintiff. *(h)* A memorandum of the sale of goods written in the seller's book, and signed by him only, is not good as against the buyer, but sufficient if signed also by the buyer's agent. *(i)* This rule has even been extended to the converse case, where the memorandum is written by the party to be charged, and signed only by the party charging. *(j)* The defendant, Crockford, wrote a memorandum beginning: "I, James Crockford," etc.; and this only the plaintiff signed; the memorandum was, however, sufficient; see Chapter XVII., that Crockford's name was a signature. *(k)* A memorandum giving the defendant's name as buyer at the beginning, written by himself and subscribed by the plaintiff as vendor, is sufficient. *(l)* A written memorandum—it has, however, been held—made by the plaintiff in his day-book, not signed by either party,

Who may
and who
may not
be agent.
One of the
parties.

(d) Wright v. Dannah, 2 Camp. 203; Bailey v. Ogden, 3 Johnson, 418; Martin v. Duffey, 4 Phila. 75 (*dubitatum*); Hazard v. Day, 14 Allen, 494; Rayner v. Linthorne, 2 Car. & P. 124; Ry. & Moo., 326; see generally on this point, Sales; Johnson v. Buck, 35 N. J. L. 340; Marx v. Bell, 48 Ala. 499.

(e) Hodges v. Howard, 5 R. I. 149.

(f) Strong v. Dodds, 47 Vt. 354; see Graham v. Musson, 7 Scott, 776; 5 Bingham N. R., 696.

(g) Frost v. Hill, 3 Wend. 386.

(h) Owen v. Thomas, 3 M. & Keene, 353.

(i) Wiener v. Whipple, 10 No. West. Rep. 434; 24 Alb. L. J., 509 (S. C. Wis.).

(j) Johnson v. Dodgson, 2 M. & W. 653 (where, however, the defendant's name appeared at the top of the writing); Higdon v. Thomas, 1 H. & Gill. 145; but see, *contra*, Graham v. Fretwell, 4 Sc. N. R. 25; 3 M. & G., 368, where a memorandum in the defendant's handwriting, but not giving his name, and signed by agent of the plaintiff, was held insufficient.

(k) Knight v. Crockford, 1 Esp. 190.

(l) Wise v. Ray, 3 Iowa, 431, citing cases.

or by any person for either of them, and proved only by oral testimony to have been made in the presence and with the consent of the defendant, is sufficient.^(m) In a Michigan case it was said: "It is true that the mechanical act of signing was the act of another; but it is equally true that it was the immediate dictate of the will of Eggleston, and was performed under his actual personal supervision. The penman was as much his instrument in respect to the act of signing as the pen itself would have been had he actually held it."⁽ⁿ⁾ A memorandum written by plaintiff's clerk, in the presence and with the assent of the defendant, has been held insufficient.^(o) Where a Roman Catholic prelate held lots of land, and let them on easy terms, but becoming unable to continue this, sold the lands to B., his agent; and after having done so met the tenants, and in B.'s presence gave them a memorandum, signed by himself, of terms under which they might hold or buy; it was held that B. was not bound by this memorandum.^(p) Terms of sale taken down by the plaintiff's agent do not bind the defendant, though read to and approved by him.^(q) A memorandum having the defendant's name as buyer at the beginning of it, and drawn by the defendant's agent and signed by the plaintiff, was held insufficient; the agent afterwards, and not in the presence of the parties, signed the defendant's name to the memorandum, but still later struck this out;^(r) the agent's conduct showed that the original insertion of the defendant's name was not intended as a signature. The insertion of the defendant's name in a deed as the bargainee, at her own request, by the plaintiff's agent, is not a sufficient memorandum.^(s) But, on the other hand, a deed left with vendor's agent, acting by parol authority, in accordance with which he filled in the blanks with the price and the

(m) *Dodge v. Van Lear*, 5 Cranch, 295; see, however, *Clason v. Bailey*, C. C. 278. (Cranch, J., dissented, and as reporter wrote the syllabus from which the above is taken.) 14 Johns, 486.

(n) *Eggleston v. Wagner*, 10 North West. Rep. 41; 46 Mich. 610.

(o) *Dixon v. Broomfield*, 2 Chitt. 205; see *Irvin v. Thompson*, 4 Bibb,

(p) *Bickett v. White*, 27 Ohio St. 405; 1 Cinc. Sup. Ct. Reporter, 170.

(q) *Cooper v. Smith*, 15 East, 107.

(r) *McMillen v. Terrill*, 23 Ind. 165.

(s) *Reeves v. Pye*, 1 Cranch, C. C. 220, citing cases. (This was not done in defendant's presence.)

purchaser's name, is good as a memorandum to bind the vendor, though bad as a deed.^(t) Where the complainant claimed under an acceptance by him of the defendant's offer of sale of certain land, it is good reason for dismissing the bill for specific performance that the land had been previously sold to one N., and that the proof of the latter's purchase was a letter written by the vendor's agent, made such by word of mouth, addressed to the vendor, and approved by N., who said that the vendor's agent was his also. The parties had a right to perform the contract even if the Statute of Frauds had applied, and, moreover, the vendee made the vendor's agent his.^(u) A bill of parcels containing the buyer's name written by the seller's agent, and accepted together with the goods by the buyer, is sufficient;^(v) the acceptance of the goods would satisfy the Statute without any regard to the memorandum. It has been said that a bill of parcels written by the direction of the seller, but not actually signed, is a good memorandum.^(w) That the memorandum consists of two writings, one executed by the agent and the other by the principal, is immaterial.^(x) A memorandum drawn by the vendees and procured by them, to be signed by the vendors' agent after the vendors had rejected the contract made by the agent and had terminated his authority, will not bind.^(y) The plaintiff's agent has no authority to bind the defendant, as by executing a bill of lading of goods claimed to have been bought by the defendant.^(z) Where the plaintiff's agent got an order for goods from the defendant, and in his presence wrote a memorandum of the purchase and kept a copy and gave one to the defendant, it was held that D. was not the defendant's agent to make the memorandum, and that making it in the defendant's presence and leaving a

(t) *Blacknall v. Parish*, 6 Jones's Eq. 70. (The blanks were filled up in the defendant's absence.) See as to the execution of the memorandum by an agent in the presence of the principal, *Packard v. Putnam*, 57 N. H. 50.

(u) *McMillan v. Bentley*, 16 Grant, 387.

(v) *Batturs v. Sellers*, 5 Harr. & J. 118.

(w) *Fall River Whaling Co. v. Borden*, 10 Cushing, 471.

(x) *Saunders v. Cramer*, 5 Ir. Eq. 12; 2 C. & Laws. 54; 3 Dr. & War. 87 (*sub nom.* *Greene v. Cramer*).

(y) *Reed v. Latham*, 40 Conn. 455; see *Williams v. Woods*, 16 Md. 246.

(z) *Strong v. Dodds*, 47 Vt. 354.

copy did not bind the defendant.(a) Where the parties met at the office of the plaintiff's factor, who wrote a bought note and delivered it to the defendant, the buyer, and wrote a counterpart and kept it, it being a custom to give a credit till the Saturday week after the contract, the date of the contract was at the defendant's request changed from Friday to Saturday, and the memorandum so altered the defendant took away with him; it was held, in view of the alteration thus made at the defendant's request, that there was enough evidence under the Statute of Frauds to go to the jury.(b) Where the parties themselves undertake to prepare or to supervise the preparation of the memorandum, a note made by an agent, even a broker, in the absence of either party, will not avail.(c) *Semble*, that a solicitor to bind his client must write as if making a contract as solicitor, and terms used by him in a letter will not bind the client, though, if used by the latter, they would have been sufficient.(d) The solicitor of one of the parties to a contract of marriage-settlement is not an agent who has implied authority to bind the parties by his memorandum; the case of an auctioneer is a peculiar one. The general rule being undoubtedly that one agent cannot act for both parties to make the memorandum.(e)

§ 370. A broker, though in the first instance employed specially by one only of the parties, has an authority to make a memorandum binding both when treated with in his quasi-official character by the other party to the contract. This exception and the reason therefor is the next subject for consideration. As a general rule, and apart from the Statute of Frauds, the same person cannot be

One agent
for both
parties;
brokers.

(a) *Murphy v. Boese*, L. R. 10 Ex. 128; *Durrell v. Evans*, 1 H. & C. 185, being criticized and distinguished on the ground that there the party to be charged had the memorandum corrected by the agent after it had been written, thereby, *semble*, adopting it.

(b) *Durrell v. Evans*, 1 H. & C. 185; 7 L. T., N. S., 97; 31 L. J. Exch. 337; *Scacc. Cam. reversing Exch.* 4 L. T., N. S., 255; 30 L. J. Exch., 255.

(c) *Lawrence v. Gallagher*, 42 N. Y. Superior, 318; 73 N. Y., 613.

(d) *Donnison v. People's Café Co.*, 45 L. T. N. S., 189.

(e) *Glengal (Earl of) v. Barnard*, 1 Keen, 788, distinguishing *Emmerson v. Heelis* on this ground, and saying that it was *contra* to *Stansfield v. Johnson and Walker v. Constable*.

agent for both parties to bind them in a contract; to this the professional broker is an exception,^(f) and the broker can make the memorandum necessary to bind the parties under the Statute.^(g) Lord Ellenborough expressed himself as of the opinion that this privilege of brokers rested rather on usage than on principle.^(h) “The rule that a broker is to be considered the agent of both parties rests upon a mere presumption of fact, which may be rebutted by the particular circumstances of the case. He is not *ex vi termini* agent for both parties.” There are brokers whose business it is to merely find a purchaser, and not to make a binding contract.⁽ⁱ⁾ Retention by the alleged principal of the note made by the broker is evidence of the latter’s authority.^(j) The broker’s clerk can make the memorandum when the latter is assented to, if even only verbally, by the party to be bound.^(k) And if an employé of a broker is directly deputed by the parties to make the memorandum, he alone can do it; and he cannot delegate this power even to his employer; and a regular entry made by the latter will not suffice.^(l) The broker must be known to both parties to be acting as agent.^(m) In an Irish case the plain-

(f) *Hinckley v. Arey*, 27 Me. 363; & Ell. 792, and text-books on Agency; see *Chapman v. Partridge*, 5 Esp. 257, *Rutenberg v. Main*, 47 Cal. 219.

(g) *Lusk v. Hope*, 17 Low. Can. Jur. 20

(h) *Johnson v. Mulry*, 4 Robertson, 401.

(i) *Henderson v. Barnewall*, 1 Y. & Jerv. 393; a broker’s clerk acting in a merely ministerial capacity, and in the presence of the broker, who finishes the memorandum himself, can bind the parties by his action; *Williams v. Woods*, 16 Md. 246.

(m) *Shaw v. Finney*, 13 Metc. (Mass.) 456; *Lawrence v. Gallagher*, 73 N. Y. 613; 42 N. Y. Super. 318 (where a doubt was raised whether the broker was sufficiently known by the parties to be acting as such; he managed the sale with some of the defendants and one of the plaintiffs, and received a commission from the latter).

(h) *Hinde v. Whitehouse*, 7 East, 568.

(i) *Dilworth v. Bostwick*, 1 Sweeny, 587 (citing *Bartlett v. Purnell*, 4 A.

tiff had deposited with Glenny, his agent, a sample of meal for the purpose of sale, and Glenny was authorized by the defendant to purchase the meal for him; it is plain, therefore, that Glenny was agent of both parties, and was authorized to bind them by any agreement made within the scope of his authority.(n) His authority is not general, but is limited to the particular transaction.(o) In England, as a broker is not by law permitted to act as principal, he must be regarded as representing some principal in his transaction.(p) Thus, where the plaintiff was employed by the defendant to buy goods, made a note stating the sale, giving defendant's name, and signed it "W. W. Simpson & Co., brokers," and it was proved that there were no "W. W. Simpson & Co.," but that this was a name under which the plaintiff traded, it was held that the latter being a principal, and not a broker, he could not execute a valid memorandum to bind the defendant.(q) Where the memorandum was executed by the plaintiff, giving the seller's, the defendant's, name, and signing himself as broker, he cannot recover as principal, for if principal he could not make a valid memorandum; and if a broker he cannot sue at all.(r) As to the requisites of the broker's memorandum, see § 373 *et seq.*

§ 371. The memorandum need not be under seal; see § 377.(s) A letter of attorney, signed in the donor's presence by an attorney, is a sufficient memorandum of authority to him to make a written contract relating to land.(t) Though a power of attorney is not generally regarded as intended as evidence of a contract made thereunder.(u) Query, whether the draft of an agreement signed by the defendant's solicitor and sent by him to the plaintiff's solicitor will bind.(v) The defendant, the

Nature and
requisites
of an
agent's
authority;
generally.

- (n) *Richey v. Garvey*, 10 Ir. L. Rep. 544. *Payne*, 124; *Ry. & Moo.* 326 (distinguishing *Atkins v. Amber*, 2 Esp. 493, as a case of actual delivery).
 (o) *Remick v. Sanford*, 118 Mass. 107. (s) *Rutenberg v. Main*, 47 Cal. 219.
 (p) *Tetley v. Shand*, 20 W. R. 206; (t) *Irvin v. Thompson*, 4 Bibb, 295.
Shaw v. Finney, 13 Metc. (Mass.) 456. (u) *Haydock v. Stow*, 40 N. Y. (1 Hand) 370.
 (q) *Sharman v. Brandt*, L. R. 6 Q. B. 720. (v) *Thornbury v. Beville*, 1 Y. & C. 562; 6 Jur., 407.
 (r) *Rayner v. Linthorne*, 2 Car. &

owner, wrote the plaintiff, who proposed to become his lessee, that H. & Co. were authorized by him to prepare a draft of the lease. The plaintiff had the draft prepared by his own solicitor and sent it to H. & Co., who signed it, and wrote that they had altered it to conform to their client's wishes; the plaintiff endeavored to get changes made in the draft, but the defendant not agreeing to do so acceded to the draft as altered; the draft was held to be a memorandum sufficient under the Statute to bind the defendant.(w) A memorandum, as follows, was held sufficient: "I have this day sold, etc. etc., for account of J. H. Rutenberg, etc. Charles Meinecke, attorney-in-fact for J. H. Rutenberg."(x) A memorandum made in the rent-book of the owner by his general agent's sub-agent, reciting a lease to the plaintiff, was considered a sufficient memorandum.(y) Where the plaintiff made a verbal offer to the defendant to buy his lease; defendant wrote to McK. accepting the offer with a condition; on this letter McK. endorsed and signed a statement, that the plaintiff had deposited with him the price of the lease until settlement had with the defendant, and that he, McK., considered the price high, in view of the condition annexed by the defendant; the memorandum was held to satisfy the Statute of Frauds.(z) Where the plaintiff's agent sold certain stock to the defendant, and sent the latter a bought note with a blank for the number of shares, and the defendant filled in the number of shares and the total sum that number of shares would come to at the price already named in the memorandum, and kept the latter, the Statute of Frauds is satisfied; the plaintiff's agent being also the defendant's.(a) A general memorandum of lease mentioning no terms, made by an agent authorized to contract for a particular lease, is insufficient.(b) Oral agency to charge realty must be clearly proved.(b')

§ 372. A memorandum signed by an agent in his own name is

(w) *Jolliffe v. Blumberg*, 18 W. R. 784.

(x) *Rutenberg v. Main*, 47 Cal. 219.

(y) *Rice v. O'Connor*, 12 Ir. Ch. 433; but see *Charlewood v. Bedford* (Duke of), 1 Atk. 497.

(z) *Field v. Bolland*, 1 Drew. & Wal. 48.

(a) *Colvin v. Williams*, 3 H. & J. 39.

(b) *Clinan v. Cooke*, 1 Sch. & Lef. 31.

(b') *Challoner v. Bouck*, 14 No. West. Rep. 811; 56 Wis., 652, citing *Lauer v. Bandon*, 43 Wis. 556.

sufficient; but see, *contra*, *Morgan v. Bergen*, 3 Neb. 213, and see below; (c) and the principal's name need not appear in the memorandum, or be known to the other party. (d) In a comparatively recent case it has been said: "The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity. It is doubtless somewhat difficult to reconcile the doctrine here stated with the rule, that parol evidence is inadmissible to change, enlarge, or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal was stated, with the qualification, that it applied, when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear, from an examination of the

In whose name the memorandum shall be.

(c) *Williams v. Bacon*, 2 Gray, 391; *Hunter v. Giddings*, 97 Mass. 41; *Gowen v. Klous*, 101 Mass. 454; *Dykers v. Townsend*, 24 N. Y. 57 (see below); *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 444; *Batturs v. Sellers*, 5 Harr. & John. 117; *Yerby v. Grigsby*, 9 Leigh, 389; *Wiener v. Whipple*, 10 No. West. Rep. 434; 24 Alb. L. J. 809, S. C., Wis.; *semble, contra*, *Dodds v. Dodds*, 9 Pa. St. 315 (in Pennsylvania, see § 380, the agent must be authorized by writing), and *Pinekney v. Hagadorn*, 1 Duer, 95, which lays down the rule given above in the text, and admits that it is otherwise in the case of deeds. In *McCaleb v. Pradat*, 25 Miss. 267, it is said that a conveyance exe-

cuted by an agent who signs his own name, however defective in law, is good to pass an equitable title.

(d) *Kenworthy v. Scofield*, 2 B. & C. 945; *Yerby v. Grigsby*, 9 Leigh, 389; *Hunter v. Giddings*, 97 Mass. 41; *Williams v. Bacon*, 2 Gray, 391; *Gowen v. Klous*, 101 Mass. 454; *Dykers v. Townsend*, 24 N. Y. 57; *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 444; *Batturs v. Sellers*, 5 Harr. & John. 117; *Weston v. McMillan*, 42 Wis. 569, citing *Higgins v. Senior*; *Washburn v. Washburn*, 4 Ired. Eq. N. Car. 309; *Oliver v. Dix*, 1 Dev. & Bat. Eq. 165; *Curtis v. Blair*, 26 Miss. 324; *Walsh v. Barton*, 24 Ohio St. 39.

cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of opinion that the practical effect of the rule, as now declared, is to promote justice and fair dealing.”(e) This rule applied to contracts relating to land.(f) The unnamed principal can sue on the memorandum(g) or be sued.(h) But in a New York case it was held that to charge the principal his name must appear in the writing.(i) Where a vendee took a memorandum executed by the agent in his own name, and entered and improved the land, he can show by parol, in defence to an ejectment by the principal, that the latter was party to the parol contract of which the memorandum was evidence.(j) Parol proof is admissible to show the relation of principal and agent, when the latter has made the memorandum in his own name;(k) this on behalf of the principal.(l) “The reason of the rule, which excludes parol testimony, tending to vary or contradict a written contract, applies with greater force to those contracts which are required by the

(e) *Briggs v. Partridge*, 64 N. Y. 362 (citing, as to cases within the Statute of Frauds, *Lawrence v. Taylor*, *Worrall v. Munn*, *McCrea v. Purmort*, and admitting that the rule did not apply to bonds or commercial paper, and citing, also, *Higgins v. Senior*, 8 M. & W. 844; *Trueman v. Loder*, 11 Ad. & Ellis, 594; *Dykers v. Townsend*, 24 N. Y. 61; *Coleman v. First Nat. Bank of Elmira*, 53 N. Y. 393; *Ford v. Williams*, 21 How. 289; *Huntington v. Knox*, 7 Cush. 371; *The Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Hubbert v. Borden*, 6 Wharton, 91; *Browning v. Provincial Ins. Co.*, 5 L. R. P. C. 263; *Calder v. Dobell*, L. R. 6 C. P. 486; *Story on Agency*, §§ 148, 160).

(f) *Central, etc., R. R. v. Wilcox*, 14 Kan. 271.

(g) *Briggs v. Munchon*, 56 Mo. 470 (citing several cases).

(h) *Lerned v. Johns*, 9 Allen, 421, citing several cases, and denying the *dictum contra* in *Stackpole v. Arnold*; see, also, *Coleman v. First National Bank*, 53 N. Y. 393, citing cases; *Wilson v. Hart*, 7 Taunton, 295; *McWilliams v. Lawless*, 17 N. W. Rep. 349, S. C., Neb.

(i) *Squier v. Norris*, 1 Lansing, 284 (citing and analyzing *Pinckney v. Hagadorn*, *Tallman v. Franklin*, *Bush v. Cole*, and *Townsend v. Corning*).

(j) *Butler v. Kaulback*, 8 Kan. 675.

(k) *Morris v. Wilson*, 5 Jur., N. S. 169; *Fenly v. Stewart*, 5 Sandf. 101; *Lerned v. Johns*, 9 Allen, 421; see *Porter v. McGrath*, 41 N. Y. Superior, 105.

(l) *Cave v. Mackenzie*, 46 L. J. Ch. 565; 37 L. T., N. S. 218; *vide infra*.

Statute to be reduced to writing than to others. The distinction appears to be this: where a contract is reduced to writing, whether in compliance with the requisitions of the Statute of Frauds or not, and it is necessary to sue upon the writing itself, there you cannot go out of the writing, or contradict or alter it by parol proof, and consequently cannot recover against a party not named in the writing; but where the contract of sale has been executed so that an action may be maintained for the price of the goods, irrespective of the writing, there the party who has had the benefit of the sale may be held liable, unless the vendor, knowing who the principal is, has elected to consider the agent his debtor.”(m) In a Pennsylvania decision it was said by the court “that there is no statute that indirectly requires that an agent shall be constituted by writing, except when he is to convey an estate in land for a longer period than three years. It is plain enough, therefore, that it needs no writing to constitute an agent to make an entry upon land so as to toll the Statute of Limitations, and of course it may be proved orally. It is one of the most common of all events to call the agent to give evidence of his authority; and we can imagine no reason for regarding this sort of an agent as incompetent to testify to such facts.”(n) But oral proof of the agency is not admissible on behalf of the agent seeking to discharge himself from the liability under the writing.(o) In California an agent or broker buying or selling land cannot recover his commissions unless there is an agreement in writing showing his employment; and no action will lie on an implied promise.(p) The difficulty in reconciling with the requirements of the Statute

(m) Fenly v. Stewart, 5 Sandf. 105 (denying *dictum* of Parke, B., in Higgins v. Senior).

The admission of parol evidence, to show that the party liable on a written contract for the purchase of goods was really the agent of the defendant, was resisted in an English case on other grounds, as being in violation of section 17 of the Statute of Frauds; the court thought the evidence admis-

sible, and did not advert to the question of the Statute; Wilson v. Hart, 7 Taunt. 295; in the S. C., 1 Moore, 50, Parke, J., said that to admit the evidence did infringe the Statute of Frauds.

(n) Miles v. Cook, 1 Gr. (Pa.) 59, citing cases.

(o) Higgins v. Senior, 8 M. & W. 844; Lang v. Henry, 54 N. H. 59.

(p) McCarthy v. Loupe, 10 Pac. C. L. J. 562 (S. C. Cal.).

of Frauds the admission of parol evidence, to show liability of parties whose names do not appear in the writing, is well illustrated by a case, in the Exchequer Chamber, in which the plaintiff, the owner of goods, had authorized his brokers, T. & M., to sell them; and T. & M. met the defendants, the brokers of one S., and made a sale; the defendants as brokers signed a memorandum: "Sold for T. & M. to our principal," not naming him, and delivered this note to T. & M., who, also as brokers, signed and delivered to the plaintiff a memorandum: "Sold to Dale, Morgan & Co. (the defendants) for account of Mr. Charles Humfrey" (the plaintiff). It was held that parol evidence was admissible to show that by usage of trade the defendants were liable if they did not disclose their principal; and notwithstanding the Statute of Frauds the plaintiff was allowed to recover.^(g) Where the defendant claimed to have been acting in a sale of land only as agent for a third party, H., it was said that while, if the memorandum had been in his name, H. could have ratified it by parol, the evidence is not admissible to relieve the defendant from liability on a memorandum drawn in his own name.^(r) Parol evidence that the defendant, who signed a memorandum as vendee, was acting for the plaintiff as well as for himself, is admissible.^(s) A lease not under seal may be shown by the lessor to have been executed by him only as agent.^(t) That towns in New England have by long usage conveyed their lands in the name of agents validates such conveyances, which would otherwise be void.^(u) The following memorandum is an example of a valid contract by an agent to bind his principal.

(g) *Dale v. Humfrey*, E. B. & Ell. 1009 (affirming S. C. below, in Q. B. 7 E. & Bl. 266, *sub nom.*, *Humfrey v. Dale*). Willes, J., dissenting, thought that the memorandum showed the defendants to be the plaintiff's agents, and that, therefore, to hold them as principals was to contradict the writing; Martin, B., thought the same, and suggested that to recover the plaintiff must by oral evidence, in violation of the Statute of Frauds, show the parties to the contract.

(r) *Love v. Cobb*, 63 N. Car. 327; see *Smith v. Strasburger*, 4 N. Y. Monthl. L. Bull. 46 (N. Y. Super. Ct.).

(s) *Thayer v. Luce*, 22 Ohio St. 74; see *McCaul v. Strauss*, 1 Cab. & Ell. 106.

(t) *Porter v. McGrath*, 41 N. Y. Super. 106; and as to contracts under seal not being within the rule, see *Lerned v. Johns*, 9 Allen, 421, *supra*.

(u) *Cofran v. Cochran*, 5 N. H. 461 (citing and considering cases).

pal: the cashier of a bank, the defendant, addressed a letter to the plaintiffs, "Forward me the past due note of, etc., and I will pay it." (v) In New York, under the Revised Statutes, the name of the principal must appear in the memorandum. (w) It is sufficient, however, to give the name of a factor having from the real owner power to sell. (x) *Seem*, also in Pennsylvania, that under the Statute of Frauds an attorney in fact must sign the name of his principal to the memorandum. (y) *Seem*, also in North Carolina; (z) also in Nebraska by statute. (a) A memorandum prepared by the defendant's secretary under a resolution of its directors, beginning as follows: "Articles of agreement between Hubert, etc., and Treherne, etc., the directors of the Equitable Gaslight Co., etc., whereas the said Hubert has agreed with the said Treherne, etc. etc., as witness our hands," was insufficient, as not a proper signature by the agent, and because a formal signing was contemplated. (b) An agent may sign his principal's name. (c)

§ 373. The memorandum made by the broker, though giving the names of both parties, is invalid if not signed by him. (d) But, in an earlier case in New York, a memorandum written by the broker in the presence of both parties was considered sufficient, though not signed; (e) and it has been held that the entry by the broker in his book need not be signed; (f) this was in an English ruling confined to the case where sufficient memoranda had been delivered to the parties. (g) The bought and

(v) *May v. National Bank of Malone*, 9 Hun, 111.

(w) *Moody v. Smith*, 70 N. Y. 599; *Williams v. Christie*, 4 Duer. 36; *Squier v. Norris*, 1 Lansing, 284 (citing cases).

(x) *Hicks v. Whitmore*, 12 Wend. 551.

(y) *Dodds v. Dodds*, 9 Pa. St. 315 (a case of the confession by an attorney of judgment in ejectment).

(z) *Phillips v. Hooker*, Phill. Eq. 193.

(a) *Morgan v. Bergen*, 3 Neb. 213.

(b) *Hubert v. Treherne*, 3 M. & G. 753; S. C., *sub nom.*, *Turner*, 4 Scott. N. R. 505.

(c) *Jackson v. Murray*, 5 T. B. Mon. 53.

(d) *Dennison v. Carnahan*, 1 E. D. Smith, 146.

(e) *Merritt v. Clason*, 12 Johns. 102.

(f) *Coddington v. Goddard*, 16 Gray, 436 (the entry was in the regular course of the broker's business, gave the names of the parties connected by the word "to," etc. etc.).

(g) *Goom v. Afalo*, 6 B. & C. 121.

sold notes signed by the broker are sufficient memoranda.^(h) The civil law as modified by statute in Lower Canada recognizes the validity of the broker's bought and sold notes.⁽ⁱ⁾ The rule holds where there is no entry in the broker's book.^(j) If there are bought and sold notes, any memorandum (not in the broker's book?) is inadmissible.^(k) The sale note is given to the seller, and the bought note to the buyer;^(l) each party being thus informed, not of what the other has agreed to, but of the engagement he has himself entered into through the broker.^(m) In *Sievwright v. Archibald*⁽ⁿ⁾ it was said that this was the usage, and that often no entry was made; that the practice was a bad one, because, while each party had a memorandum of what he had agreed to, he has no knowledge of the contract of the other party; and it was said that the legislature should compel the broker to make the entry. It may be safe even to say that the sold note delivered to the seller is the memorandum which binds the buyer, and *vice versa*.^(o) The rule has been laid down that the broker is bound to enter in his own books the contract signed by him, to bind them both, or deliver to each a note of it, as of purchase or sale, as the case might be. By the delivery of the sold note he only bound the seller and not the defendant.^(p) Either bought note or sold note alone is sufficient.^(q) This, in absence of any proof,

(h) *Rucker v. Cammeyer*, 1 Esp. 105; *Trueman v. Loder*, 11 A. & Ell. 594; *Henderson v. Barnewall*, 1 Y. & Jerv. 393; *Sievwright v. Archibald*, 17 A. & Ell., N. S., 114, doubting the rule on principle, but considered it settled on authority.

(i) *Lusk v. Hope*, 17 Low. Can. Jur. 20; C. C., art. 1235 (corresponding to sec. 17 of 29 Car. II., c. 3); *Tourville v. Essex*, 8 Low. Can. Jur. 314.

(j) *Henderson v. Barnewall*, *supra* (citing *Goom v. Afalo*); *Dickenson v. Lilwal*, 1 Stark. 129; *Thornton v. Charles*, 9 M. & W. 802 (considering *Hawes v. Forster*).

(k) *Richey v. Garvey*, 10 Ir. L. Rep. 428.

(l) *Rucker v. Cammeyer*, *supra*.

(m) *Butler v. Thomson*, 92 U. S. 412.

(n) 17 A. & Ell., N. S., 114.

(o) *Thompson v. Gardiner*, 1 C. P. D. 777; 18 Moak, 331 (n.); see, however, *Sievwright v. Archibald*, 17 Ad. & Ell., N. S., 114.

(p) *Stocker v. Partridge*, 2 Roberts. 202 (citing *Roget v. Merritt*, 2 Caines, 117; *Waring v. Mason*, 18 Wend. 425; *Merritt v. Clason*, 12 John. 102; *Worrall v. Munn*, 5 N. Y. Rep. 229; *Fenly v. Stewart*, 5 Sandf. 101; *Bailey v. Ogden*, 3 Johns. 399).

(q) *Parton v. Crofts*, 16 C. B., N. S., 21 (a sold note); *Hawes v. Forster*, 1 Moo. & Rob. 373 (a bought note); *Hankins v. Baker*, 46 N. Y. 670 (a bought note); *Green v. Lewis*, 26 U. C.

that the other note or *semble* the broker's book contained different terms.^(r) Baron Parke, in *Moore v. Campbell*,^(s) expressed himself as being of the opinion that if the broker had been agent of both parties instead of the plaintiff only, or if the defendant had understood the memorandum which he, the defendant, signed to be the evidence of the contract, he would have been bound though the notes differed, and that it was a question for the jury whether it was part of the agreement that the plaintiff also should sign; but otherwise if the defendant did not intend to be bound until the plaintiff bound himself by signing; and that these were questions for the jury. Where the broker, after the sale at the plaintiff's instance and without the defendant's knowledge, made a material alteration in the plaintiff's sold note, and the defendant's bought note not having been produced, the Statute of Frauds was held to apply.^(t) But a sold note of chattels drawn by the agent of both and delivered to the buyers, and accepted in writing by them, binds the latter.^(u) A broker made one note and sent it signed to the seller, the plaintiff, and sent another not signed to the defendant, the buyer, and entered and signed both notes in his book; the buyer kept the note some time, and, in refusing to take the goods, only made the objection that the note sent him had not been signed by the broker; it was held that the buyer having kept the note, and not denying the broker's authority, there was sufficient evidence of authority in the broker to make the memorandum for both parties, and that the signed memorandum sent the seller was the proper one to bind the buyer, and that, apart from this, the entry in the book was sufficient, the broker's authority being proved. Groves, J., thought the keeping of the note was not sufficient proof of authority, but thought that the buyer's not having denied the broker's authority,

Q. B. 625 (bought note); see Langdell's *Sel. Cas. in Sales I.*, p. 412, calling attention with the view of its effect upon *Hawes v. Forster* of the regulation of the board of aldermen of the city of London, A.D. 1815, requiring the brokers to make at the time of the transaction an entry in their book,

to deliver bought and sold notes, and to show the entry to either party upon request.

(r) *Parton v. Crofts*, *supra*.

(s) 23 L. J. Ex., 310.

(t) *Powell v. Divett*, 15 East, 31.

(u) *Cabot v. Winsor*, 1 Allen, 549.

was, under the circumstances, sufficient proof of the latter.(v) Where the buyer's broker prepared a bought note and retained it, and there was no evidence that any memorandum was delivered to the sellers, the latter, after the delivery and acceptance of part of the goods, were allowed to proceed in bankruptcy against the buyers for the difference between the contract price and the amount realized by the sale which they, the sellers, made of the undelivered goods, and though there was delivery and acceptance to satisfy the Statute of Frauds, yet the court appeared to have regarded the memorandum as sufficient.(w) Where there was a sold note drawn by the broker and delivered to the seller, the plaintiff, the Statute of Frauds is not satisfied.(x) A memorandum drawn by a broker, beginning as follows: "Sold for Messrs. Butler, etc., to Messrs. Thomson," etc., and signed as brokers, and this with a copy precisely identical delivered respectively to each party, is sufficient to hold the buyers, though there are no words of purchase, the selling implying a buying.(y) For an example of memoranda regarded as bought and sold notes perhaps, and as being not mere invoices, but a sufficient note under the Statute of Frauds, see *Durrell v. Evans*.(z)

§ 374. Where a paper was signed by the defendant, the seller, it was in one case said that *non constat*, but that the defendant might have a note signed by the plaintiff evidencing the sale as a "bought note" (the court, *semble*, regarding the note held by the seller to be the "bought note").(a) Where the defendant's agent, conducting the former's business, in which she, the agent, had a part interest, and the plaintiff agrees during a negotiation that A. should act as broker, and A., under the

Brokers' memo-
randa
generally.

(v) *Thompson v. Gardiner*, 1 C. P. D. 778; 18 Moak, 331 (n.).

(w) (*Ex parte*) *Thomas, Re Thorp*, 11 Jur., N. S., 49.

(x) *Newberry v. Wall*, 65 N. Y. 488.

(y) *Butler v. Thomson*, 92 U. S. 412 (citing several cases, and reversing the same case below in the United States District Court for the Eastern District of New York, which held the omission

of the words of purchase fatal, and distinguished *Salmon Falls Co. v. Goddard* as a case where the word "purchase" was used).

(z) In *Scacc. Cam.*, 1 H. & C. 185; 7 L. T., N. S., 97; 31 L. J. Exch., 337; in *Exch.* 4 L. T., N. S., 255; 30 L. J. Exch., 254.

(a) *Spear v. Hart*, 3 Roberts. 424.

plaintiff's instructions, afterwards enters in his book the sale as stated by the plaintiff, and sends a note of it to the defendant's agent, who keeps it, and who, later, expresses her regret at having made the bargain, it was held that the Statute of Frauds was satisfied if the jury found the agency.(b) The plaintiff, the seller, and defendant, the buyer's agent, were members of a gold exchange bank, and each of them wrote a memorandum of a sale of gold, and addressed it to the cashier of the Exchange Bank; these, with a letter addressed by the defendant to his principals, were held sufficient memoranda to satisfy the Statute of Frauds; the cashier, as an officer of the bank, had power under its by-laws to act as agent for the consummation of a contract between members.(c) A broker, upon the defendant's orally agreeing to take certain goods, executed a memorandum of the sale, and signed as broker, generally; this memorandum he delivered to the plaintiff, who endorsed and delivered to him a warehouse delivery order; it was held that the memorandum and the delivery order were sufficient to satisfy the Statute of Frauds.(d) A memorandum made by the broker in his own name, and for his own convenience, is sufficient.(e) In another case the court used the following language: "But then it is said that this memorandum was made after the sale, merely for the use of the agent, and retained in his possession; but it was made while his authority continued, and though for his own use, not therefore the less a document coming within the meaning of the Statute. If it contain the terms of the contract, it does not signify with what other object the agent made it, and being in his possession, it must be held to be constructively in the possession of both parties, he being the common agent.(f) Broker's memoranda, like others, must contain the entire contract.(g)

(b) *Chapman v. Partridge*, 5 Esp. 257 (Mansfield, C. J., in his charge to the jury seems to have thought that the defendant was the manager of the business, but *semble secus*).

(c) *Peabody v. Speyers*, 56 N. Y. 233.

(d) *Hankins v. Baker*, 46 N. Y. 670

(citing, as to agents' authority, *Lawrence v. Taylor and Maclean v. Dunn*).

(e) *Noakes v. Morey*, 30 Ind. 103.

(f) *Richey v. Garvey*, 10 Ir. L. Rep. 544 (per Blackburne, C. J.).

(g) *Boardman v. Spooner*, 13 Allen, 358.

§ 375. In an early case in chancery, in England, the usage of brokers to make the memorandum in a book is noticed; in that case the book was a pocket-book.^(h) The entry in the book is sufficient without any bought and sold notes.⁽ⁱ⁾ In a case in 1 Starkie Lord Ellenborough said: In the case of *Hinde v. Whitehouse* the entry in the book was considered as the contract, and the bought and sold notes were merely evidence of it. That case does not go the length of deciding that where no entry is made in the broker's book the bought and sold notes may not be sufficient to satisfy the Statute. . . . Any memorandum is sufficient to save the Statute of Frauds, although each party may not have the producible benefit of it.^(j) A note entered by the broker in his book, and signed by him, is sufficient under the Statute of Frauds.^(k) An entry made in his book by a broker at the dictation of the plaintiff, and in the presence of the defendant, is sufficient.^(l) Lord Ellenborough, in another case, said: "After the broker has entered the contract in his book I am of opinion that neither party can recede from it. The bought and sold note is not sent on approbation, nor does it constitute the contract. The entry made and signed by the broker, who is the agent of both parties, is alone the binding contract. What is called the bought and sold note is only a copy of the other, which would be valid and binding; although no bought and sold note was ever sent to the vendor or purchaser. The defendant is equally liable in this case as if he had signed the entry in the broker's book with his own hand."^(m) Apart from the fact there are bought and sold notes, the entry in the book may be sufficient.⁽ⁿ⁾ The rule is otherwise when the notes delivered are inconsistent; see § 377. Under such circumstances the entry in

Entry in
broker's
book.

- (h) *Mussell v. Cooke*, Prec. Ch. 533. that there it was the impression that
(i) *Henderson v. Barnewall*, 1 Y. & the entry and not the bought and sold
Jerv. 393. notes were the contract).
(j) *Dickenson v. Lilwal*, 1 Stark. (l) *Toomer v. Dawson*, Cheeves, 69.
129. (m) *Heyman v. Neale*, 2 Camp. 338.
(k) *Thornton v. Charles*, 9 M. & W. (n) *Thompson v. Gardiner*, 1 C. P.
802 (and saying of *Hawes v. Forster*, D. 778; 18 Moak, 331 (n.).

the book has not been held to be the original memorandum.^(o) A press copy of a memorandum, in the shape of a letter to the seller, is not equivalent to an entry in the broker's book to bind both parties.^(p)

§ 376. Where the bought and sold notes differ there is no contract proved, for the parties have never contracted in writing *ad idem*.^(q) In *Sievwright v. Archibald*, it was held that bought and sold notes which do not agree do not together form the memorandum, for they differ; nor separately, because the bought note, even if considered as executed by the defendant, the buyer, through his agent, is delivered, not to the plaintiff but to the defendant himself; nor is the sold note the memorandum, because its language shows the plaintiff's engagement, not the defendant's; one note only is good when there is no notice to produce the other, and it is assumed that they agree.^(r) In the same case a more satisfactory reason is given for the rule when it is said that the bought note acceded to by the buyer, defendant, was not the memorandum, because another writing was intended, and was actually made, *i. e.*, the bought and sold notes; the bought note, therefore, was but one-half of the contract. The best reason of all, however, is that each party is supposed to have agreed to what is contained in the note delivered to him, and if these notes differ it is plain that there is no written proof to satisfy the Statute of any *aggregatio mentium*; if this is so, the plaintiff cannot ignore what he has agreed to, and seek to hold the defendant on something else which *he* has agreed to. Erle, J., who dissented in the above case, went the length of considering the acceptance of the memorandum by the defendant

Bought and sold notes differing from the book or from each other.

(o) *Townend v. Drakeford*, 1 C. & K. 22; *Cumming v. Roebuck*, Holt, N. P. C. 173 (Gibbs, C. J., saying that there was a case, since contradicted, holding the broker's book to be original); *Grant v. Fletcher*, 5 B. & C. 437, holding the book to be the original, except when the notes differed.

(p) *Pitts v. Beckett*, 13 M. & W. 751.

(q) *Thornton v. Kempster*, 5 Taunt. 788; *Gregson v. Ruck*, 4 Ad. & Ell., N. S., 747; *Cowie v. Renfrey*, 5 Moore, P. C. C. 251; *Townend v. Drakeford*, 1 C. & K. 22; *Grant v. Fletcher*, 5 B. & C. 437.

(r) 17 A. & Ell., N. S., 114 (distinguishing *Hawes v. Forster* and *Goom v. Aflalo* as cases where the notes and the book agreed).

to be the efficacious fact, and thought that such memorandum was good by itself, and notwithstanding the sold note showed that seller's contract was different. An earlier case gives support even to this extreme contention, for where the plaintiff's note was silent as to a certain stipulation contained in the defendant's bought note, the latter was held to bind.(s) Where the discrepancies between the notes are in fact on immaterial points, parol evidence is admissible to show this.(t) And proof of mercantile usage is admissible for this purpose.(u) In a Maryland case, where the memoranda delivered by the broker differed from the entry in his books they were separately treated, and the plaintiff allowed to recover on any one of them, upon evidence of usage to supply such terms to each as would make them substantially agree; one memorandum mentioned six months' credit; another that the commercial paper should be satisfactory to the seller; but the evidence of usage was that both the terms were in the contract, unless there was something said or written to the contrary. It was questioned whether there could be any recovery if the proof of usage failed, and that while the terms of the actual contract, though contained in all the memoranda taken together, yet were not contained in any one writing, and there being no reference by one memorandum to the other.(v) The rule as to discrepancy applied where the memoranda are made by each party respectively.(w) Where the entry in the plaintiff's book and the note delivered by the broker to the defendant differed, it was held that the Statute was not complied with, and this though the point of difference was a warranty omitted from the memorandum made by the plaintiffs, and though the latter conceded that they had sold under a warranty as stated in the

(s) *Rowe v. Osborne*, 1 Stark. 113 (per Lord Ellenborough); but see *Peltier v. Collins*, 3 Wend. 465.

(t) *Kempson v. Boyle*, 3 H. & C. 765; 34 L. J. Exch., 191.

(u) *Bold v. Rayner*, 1 M. & W. 343; see *Williams v. Woods*, 16 Md. 246, as to proof of usage to supplement a broker's memorandum; in *Hawes v. Forster*, 1 Moo. & Rob. 373, Lord Denman left it to the jury to find whether,

by usage of trade in London, the notes rather than the broker's book were the evidence, and the jury found for the usage.

(v) *Williams v. Woods*, 16 Md. 246.

(w) *Vandenbergh v. Spooner*, L. R. 1 Exch. 319; but *semble* that the note executed by the defendant might have bound him if it had been properly drawn.

defendant's memorandum;(x) nor, as has been said, can the broker's book be resorted to where the notes differ.(y) There is a *dictum* in *Sievevright v. Archibald* to the opposite effect; in this case there was in fact no entry in the book.(z) Benjamin on Sales adopts the *dictum* of the majority in *Sievevright v. Archibald* as being the present English law.(a) While undoubtedly the case of *Sievevright v. Archibald* contains a very clear statement of opinion, as does also *Heyman v. Neale*, it must be remembered that the former case is *dictum* only, and that the latter authority has had many cases later in time which do not follow it; the current of opposite opinion is certainly strong, and it is difficult to say what is really the law. See the remarks on this subject in *Blackburn on Sales*, p. 107. It is suggested in *Benjamin on Sales* that if the bought and sold notes agree with each other, and differ from the broker's book, the jury can find in them a *new* contract doing away with that evidenced by the book. In *Brown on the Statute of Frauds* the law is regarded as quite unsettled. This hopeless inconsistency of authority, together with the absence of any broad determining principle which might apply, make considerations of expediency to be of more than usual importance; and there can be little doubt as to the answer which a man of business would give to such a question as the following: Shall one be bound to a different contract than that which appears in the memorandum delivered to him by his broker, because the contract sought to be enforced has been duly entered in the broker's book, to which book there has been no invariable habit on the part of the traders to refer,

(x) *Peltier v. Collins*, 3 Wend. 465; see *Rowe v. Osborne*, *supra*.

(y) *Townend v. Drakeford*, *supra*; *Thornton v. Meux*, Moo. & Mal. 44 (Lord Tenterden saying that his former doubts on the subject were removed); *Grant v. Fletcher*, 5 B. & C. 437 (where however the broker's book was not signed by him); *Cumming v. Roebuck*, Holt's N. P. C. 173; *Hawes v. Forster*, 1 Mood. & Rob. 373.

(z) 17 A. & Ell., N. S. 114 (citing *Thornton v. Charles*, Pitts v. Becket,

and distinguishing *Hawes v. Forster* as a case where the jury found a custom of trade by which the notes controlled the entry in the book, and denying the *dictum* of Lord Tenterden in *Thornton v. Meux*).

(a) *Benjamin*, § 299, relying on *Heyman v. Neale*, *Sievevright v. Archibald*, and *Thornton v. Charles*; see, also, 10 Chic. Legal News, 152, containing an article from the Lond. Law Times endorsing Mr. Benjamin's views.

their reliance under the sanction of many decided cases having generally been placed, instead upon the bought and sold notes of the broker? Lord Blackburn denies (Blackburn on Sales, p. 107) that there is any rule of commercial law which gives the broker's book the rank which has been claimed for it, and even in *Sievwright v. Archibald* it is admitted that additional legislation is necessary before the broker can be compelled to make the entry in his book. Where the broker gave by mistake bought notes to each party, so that the buyer's name did not appear, but made the proper entry in his book, it was good, because the seller could not complain, as he could not assume that the broker in violation of the law was acting for himself, and could have asked who the buyer was; that is to say, the entry in the book satisfies the court, and the note delivered could not have misled the defendant, the seller, who was put upon notice, and who could have asked for the entry on the broker's book, or have asked who the buyer was.(b) In a case which went off on a point as to the acceptance of the goods sold, there was a *dictum* of Baron Parke, concurred in by Alderson, B., which said that, where the notes differed, the broker's book might be resorted to, but Lord Abinger would only agree to this when the broker's book was not known to the parties.(c)

§ 377. In the absence of statutory requirement calling for a writing, authority can, as a general rule, be given to an agent by parol.(d) It was said in one case that authority to do a thing which may be done by parol may itself be by parol; but perhaps the word "parol"

Oral authority to agent generally. Authority by deed

(b) *Gale v. Wells*, 1 C. & P. 390 (distinguishing *Champion v. Plummer* as a case where one party had refused to sign).

(c) *Thornton v. Charles*, 9 M. & W. 802. On the subject of differing sales-notes see *Wharton on Agency*, §§ 720-1; 9 Chic. Leg. News, p. 22 (an article taken from the *Law Times* of London). On the general subject of bought and sold notes see the citations in the note. *Ewell's Evans's Agency*, pp. *193-207;

Paley's Agency, p. 315, n. (4th Am. ed.); *Langdell's Sel. Cas. on Contr. i.*, pp. 1005-6 (index). For forms of these notes see *Blackb. on Sales*, p. *89.

(d) *Gilmer v. Gorham*, 4 McLean, 417; *McConnell v. Brillhart*, 17 Ill. 360; *Ledbetter v. Walker*, 31 Ala. 175; *Humphreys v. Wilson*, 43 Miss. 336; and see, generally, below *Lake v. Campbell*, 18 Ill. 109 (citing cases); *Hammond v. Hanson*, 21 Mich. 374.

generally
and to con-
vey land.

is used in its technical sense;(e) and as to written or sealed authority being necessary to make a deed, see *infra*. Such parol agency must be clearly shown to emanate from the principal, otherwise this doctrine would become a most mischievous evasion of the Statute of Frauds.(f) Where a broker sent a buyer, the defendant, a bought note not signed, it was held that the circumstances of having kept the note, and not having denied the broker's authority, were a sufficient proof of the latter.(g) Under a statute requiring the proof of agency to be in writing, it was held that where the party sought to be charged directs another to sign for him, which is in the presence of such party, the rule does not apply, and the Statute of Frauds is satisfied, but *secus* if the signature is done out of the presence of such party.(h) The rule requiring even an unsealed writing has been relaxed in the case of a deed executed on his behalf, in the presence and at the request of the grantor.(i) On this, in a case in South Carolina, the court was equally divided.(j) Where the engagement of the agent was one requiring a certain measure of statutory proof (as by one credible witness and corroborating circumstances), the authority to make such an engagement, though by the same code permitted to be verbal, must have the same proof as the engagement itself.(k) In Scotland a written contract as to land must on both sides be holographic and attested, whether the sale is between the principals or is by an agent.(l) Where a special statute required a commissioner selling land to make a formal official statement, an informal memorandum

(e) *Pickard v. Brewer*, 2 Dev. & Bat. Eq. 435.

(f) *Mortlock v. Buller*, 10 Ves., Jr. 311.

(g) *Thompson v. Gardiner*, 1 C. P. D. 778; 18 Moak, 331 (note); see *Albertson v. Ashton*, 102 Ill. 56, for example of insufficient written authority.

(h) *Rockford, etc., R. R. v. Shunick*, 65 Ill. 228; and a discussion of the point, how such signing in the presence of the principal is equivalent to written

authority, see *Mutual Life, etc., Ins. Co. v. Brown*, 30 N. J. Eq. 202, with reporter's note).

(i) *Hanson v. Rowe*, 26 N. H. 328; *Gardner v. Gardner*, 5 Cushing, 483; *Videau v. Griffin*, 21 Cal. 391.

(j) *Wallace v. McCullough*, 1 Rich. Eq. 426.

(k) *Gardes v. Schoeder*, 17 La. Ann. 143.

(l) *Littlejohn v. Hadwen*, 20 Scotch L. Reporter, 6; see *Gavine v. Lee*, id. 303; *Bell v. Goodall*, id. 600.

by an agent is insufficient.(*m*) The authority to make a specialty must be under seal.(*n*) While, as will be seen, authority to make a binding contract for the sale of land may, as a general rule, be given by parol, power to convey the land must be evidenced by a deed.(*o*) As to authority by a private writing, without the necessity for any authentic act, being sufficient in Louisiana, see the cases in the note.(*p*) A warrant of attorney to convey land must, under a Kentucky statute saying that no estate in land, etc., shall pass unless the conveyance be declared by writing sealed, be under seal.(*q*) So an authority to fill the blanks of a mortgage.(*r*) So to execute a lease.(*s*) So authority by one partner to another to make a deed;(t) but see *contra*.(*u*) But where a mortgagor knew of the equitable assignment of a mortgage, he cannot pay the assignor to the detriment of the assignee; and though

(*m*) *Krebs v. Dodge*, 9 Wis. 14.

(*n*) It is scarcely worth while to collect cases on this point, but the following are a few authorities in point: *Cummins v. Cassily*, 5 B. Mon. 75; *Clark v. Courser*, 29 N. H. 176; *Humphreys v. Wilson*, 43 Miss. 336; *Pickard v. Brewer*, 2 Dev. & Bat. Eq. 435; *Boyd v. Dodson*, 5 Humphr. 37; *Rhode v. Louthain*, 8 Blackf. 413; *Lake v. Campbell*, 18 Ill. 109; *Purcell v. Potter*, Anth. N. P. 311.

(*o*) *Wedderburne v. Carr*, cited in *Burge on Conflict of Laws*, vol. ii. 520; *Steiglitz v. Egginton*, 1 Holt, 141; *Callaghan v. Pepper*, 2 Irish Eq. 401; *Herbert v. Hanrick*, 16 Ala. 589; *Johnson v. Dodge*, 17 Ill. 440; *Peabody v. Hoard*, 46 Ill. 245; *Rhode v. Louthain*, 8 Blackf. 413; *Talbot v. Bowen*, 1 A. K. Marsh. 436; *Curtis v. Blair*, 26 Miss. 309; *Johnson v. McGruder*, 15 Mo. 365; *Schuetze v. Bailey*, 40 Mo. 74; *Tappan v. Redfield*, 5 N. J. Eq. 339; *Force v. Dutcher*, 18 N. J. Eq. 405; *Hayes v. Skidmore*, 27 Ohio St. 333; *Mortimer v. Cornwell*, 1 Hoff. Ch. 351; *McWhorter v. McMahan*, 10 Paige, 386;

Champlin v. Parish, 11 Paige, 405; *Coleman v. Garrigues*, 18 Barb. 66; *Pringle v. Spaulding*, 53 Barb. 17; *Van Ostrand v. Reed*, 1 Wend. 431; *Worrall v. Munn*, 1 Seld. 239; *Snively v. Luce*, 1 Watts, 69; *Lewis v. Bradford*, 10 Watts, 67; *Smith v. Dickinson*, 6 Humph. 261; *Farris v. Martin*, 10 Humph. 498; *Yerby v. Grigsby*, 9 Leigh, 387; *McNutt v. McMahan*, 1 Head, 101; *Dodge v. Hopkins*, 14 Wis. 639.

(*p*) *Smith v. Kinney*, 30 La. Ann. 334; see *Kearney v. Dacote*, 23 La. Ann. 191.

(*q*) *Plummer v. Russell*, 2 Bibb, 174; 1 Brad. 286.

(*r*) *Ayres v. Probasco*, 14 Kan. 187; see *Gratz v. Phillips*, 1 Pen. & W. 333; *Jackson d. Lloyd v. Titus*, 2 Johns. 432.

(*s*) *Post v. Martens*, 2 Roberts. 439; *Folsom v. Perrin*, 2 Cal. 603.

(*t*) *Turbeville v. Ryan*, 1 Humphr. 119; *Fisher v. Tuke*, 1 McCord Ch. 171.

(*u*) *Wilson v. Hunter*, 14 Wis. 686, *infra*.

there appears no written assignment, the court will assume the existence of a sealed power from the assignor to the assignee authorizing the latter to act for the former.(v) And, in Alabama, it has been held that authority to make a bond may be given by parol.(w) So, in the same state, an authority by one partner to another to make a deed of land; and a parol ratification was also held good.(x) Even in Pennsylvania, where an agency to contract for the sale or purchase of land must be proved by a writing, it was held that where the holders of an equitable title had assigned it by a sealed writing, a direction by one of the equitable owners with the verbal assent of the other, given to the holder of the legal title, to make a deed thereof directly to the assignee of the equitable title, who had paid the price to the assignors, is good, though oral, the original sealed contract having complied with the Statute of Frauds.(y) The vendor's agent cannot bind the bargainee by inserting the latter's name in his deed.(z) Nor can an attorney bind his client by a confession of judgment in ejectment, especially when the consideration of the defendant's promise was a parol promise of the plaintiff to convey to the defendant other land.(a)

§ 378. An unsealed writing has, however, been considered sufficient in some states.^(b) So to execute the defeasance of an absolute conveyance.^(c) Authority to transfer personalty need not be by deed.^(d) A deed executed by an agent can be sustained by parol proof of agency if an unsealed writing would have done as well as the deed.^(e) This principle applied to the case of a partner who making a sale, within the line of the partnership business, added unneces-

Unsealed authority when good as to land, etc.; agent making deed when parol writing would have been enough.

Unsealed
authority
when good
as to land,
etc.; agent
making
deed when
parol writ-
ing would
have been
enough.

(v) *Cutler v. Haven*, 8 Pick. 490. Videau *v.* Griffin, 21 Cal. 391; Brown
(w) *Gibbs v. Frost*, 4 Ala. 728. *v.* Eaton, 21 Minn. 410.
(x) *Herbert v. Hanrick*, 16 Ala. 589. (c) *Gratz v. Phillips*, 1 P. & W. 333;
(y) *Bonner v. Campbell*, 48 Pa. St. see Snively *v.* Luce, 1 Watts, 69.
289. (d) *Van Ostrand v. Reed*, 1 Wend.
(z) *Reeves v. Pye*, 1 Cranch, C. C. 431.
220. (e) *Lyon v. Pollock*, 99 U. S. 673;
(a) *Dodds v. Dodds*, 9 Pa. St. 315. Ledbetter *v.* Walker, 31 Ala. 176;
(b) *Shamburger v. Keunedy*, 1 Dev. White *v.* Fox, 29 Conn. 575; *semble*
2: *Gardner v. Gardner*, 5 Cush. 483; *Graham v. Dixon*, 4 Ill. 117; *Minor v.*

sarily a seal to the writing.(f) Applied also to a deed invalid as such treated as binding in the character of an admission;(g) or as a memorandum under the Statute of Frauds.(h) In a case in *Espinasse* a sailor was allowed to bring *assumpsit* on an instrument sealed inadvertently.(i) It has, however, been said, that the principal is not ordinarily liable in covenant on a deed executed by an agent authorized by parol merely, because the subject matter being personalty the seal was unnecessary.(j) The doctrine now under consideration has been less broadly laid down as where it was said, the general rule of the common law is, that an agent cannot bind his principal by a sealed instrument, unless he has been appointed by a writing under seal. But the rule seems in this country to have been so far relaxed as to allow a subsequent ratification by acts of a contract under seal, if the law does not require such instruments to be sealed.(k) Even this special point of ratification has been limited as, for example, where an agent contracted to sell, the only written proof of his authority being an insufficient power of attorney and authorizing him not to sell, but to convey, and the principal verbally directed the agent to convey, and also by word of mouth ratified the sale and accepted the price, it was held that an action under a warranty of this title lay against one who had received and assigned it with the warranty, on the part of the warrantee, evicted under the title of the principal.(l) Where an

- Willoughby*, 3 Minn. 233; *Groff v. Ramsay*, 19 Minn. 50; *Dickerman v. Ashton*, 21 Minn. 538; *Thomas v. Joslin*, 30 Minn. 388; *Schuetze v. Bailey*, 40 Mo. 74; *Long v. Hartwell*, 5 Vroom, 121; *Skinner v. Dayton*, 19 Johns. 546; *Worrall v. Munn*, 1 Seld. 239; *Lawrence v. Taylor*, 5 Hill (N. Y.), 112; *Wood v. Auburn R. R.*, 8 N. Y. 167; *Congregation Beth-Elohin v. Central Presbyterian Church*, 10 Abb. Pr., N. S., 487; *Sherman v. New York Central R. R.*, 22 Barb. 248; *Baum v. Dubois*, 43 Pa. St. 265; *Swisshelm v. Swissvale Co.*, 11 Pittsb. L. J., 84; 95 Pa. St. 367; *Farris v. Martin*, 10 Humph. 498; *Bledsoe v. Cains*, 10 Tex. 460.
- (f) *Schmertz v. Shreeve*, 62 Pa. St. 460; so, also, *Tapley v. Butterfield*, 1 Metc. (Mass.) 517; so also in the case of a deed of trust of a chattel; *Crozier v. Carr*, 11 Tex. 381.
- (g) *Morrell v. Cawley*, 17 Abb. Pr. 82.
- (h) *Morrow v. Higgins*, 29 Ala. 450 (only in chancery however).
- (i) *Clement v. Gunhouse*, 5 Esp. 83.
- (j) *Hanford v. McNair*, 9 Wend. 54.
- (k) *Adams v. Power*, 52 Miss. 531 (citing several cases); *Powell v. Gosson*, 18 B. Mon. 193.
- (l) *Allis v. Goldsmith*, 22 Minn. 127.

agent authorized to contract, but not to sell, conveys, there is a good equitable title after payment of the price and twenty years' possession of the land.^(m) But it has been decided that to make a contract of sale of land under seal, there must be an authority evidenced by deed or simple written contract.⁽ⁿ⁾ The general rule would appear to have been denied in a Pennsylvania case, holding that an agent under a parol authority cannot bind the principal as surety by a specialty.^(o) But these decisions suggest an obvious exception, namely, that an agent authorized by parol cannot bind by a specialty, even if an unsealed writing would have been enough, if there is any attempt made to take advantage of the points of difference between a simple contract and the specialty, as, for example, a reliance upon the seal to prove consideration, or to take the contract out of the statute of limitations.

§ 379. Parol authority is sufficient to enable an agent to make a contract for the sale of land binding under the Statute of Frauds.^(p) Under the civil law, in Lower Canada, the

(m) *Jones v. Marks*, 47 Cal. 248.

(n) *Van Horne v. Fricke*, 6 S. & R. 90; *Blood v. Hardy*, 15 Me. 63; *Worrall v. Munn*, 1 Selden, 239.

(o) *Gordon v. Bulkeley*, 14 S. & R. 332; see, also, *Stetson v. Patten*, 2 Me. 360.

(p) *Coles v. Trecothick*, 9 Ves., Jr. 242; *Deverell v. (Lord) Bolton*, 18 Ves. Jr. 509; *Waller v. Hendon*, 5 Vin. Abr. 524, pl. 45; *Clinan v. Cooke*, 1 Sch. & Lef. 31; *Wedderburne v. Carr*, cited in *Burge on Conflict of Laws*, vol. ii. 520; *Norris v. Cooke*, 7 Ir. C. L. Rep. 41; *Ledbetter v. Walker*, 31 Ala. 175 (but changed now by statute, *vide infra*); *Rulenberg v. Main*, 47 Cal. 219; *Edwards v. Johnson*, 3 Houst. 438 (Del.); *Doty v. Wilder*, 15 Ill. 417; *Johnson v. Dodge*, 17 Ill. 440; *Collins v. Smith*, 18 Ill. 162; *Peabody v. Hoard*, 46 Ill. 245; *Taylor v. Merrill*, 55 Ill. 58; *Cossitt v. Hobbs*, 56 Ill. 233; *Proudfoot v. Wightman*, 78 Ill. 553; *Renwick v. Bancroft*, 9 Nor. W. Rep. 368 (S. C. Ia.);

Rottman v. Wasson, 5 Kans. 556; *Butler v. Kaulback*, 8 Kans. 675; *Ayres v. Probasco*, 14 Kans. 189; *Talbot v. Bowen*, 1 A. K. Marsh. 436; *Irvin v. Thompson*, 4 Bibb, 295; *Jackson v. Murray*, 5 T. B. Mon. 53; *Baker v. Wainwright*, 36 Md. 347; *Groff v. Ramsey*, 19 Minn. 50-53; *Dickerman v. Ashton*, 21 Minn. 538; *Brown v. Eaton*, 21 Minn. 410; *Allis v. Goldsmith*, 22 Minn. 127; *Curtis v. Blair*, 26 Miss. 309; *Johnson v. McGruder*, 15 Mo. 365; *Riley v. Minor*, 29 Mo. 439; *Doughaday v. Crowell*, 3 Stockt. 202; *Long v. Hartwell*, 5 Vroom, 121; *Robinson v. Hathaway*, 4 West. L. Monthly, 107 (Union Co., Ohio); *Turnbull v. Trout*, 1 Hall, 340 (citing numerous cases); *Mortimer v. Cornwell*, 1 Hoff. Ch. 351; *McWhorter v. McMahan*, 10 Paige, 386; *Champlin v. Parish*, 11 Paige, 405; *Pringle v. Spaulding*, 53 Barb. 17; *Coleman v. Garrigues*, 18 Barb. 66; *Squier v. Norris*, 1 Lansing,

agent's authority may be proved by parol;(g) and in Louisiana to act at least as intermediary.(r) A verbal authority is sufficient to authorize the making of the entry, and the preparing the notice necessary to establish a mining claim;(s) also to execute a written sale of a mining claim.(t) So authority to make tender of money to redeem land sold for taxes, the case being no exception to the ordinary common law rule.(u) So, even in Pennsylvania, *vide* § 380, authority to make an entry upon land to toll the statute of limitations.(v) There has been a distinction taken between an authority to make a contract and that to formulate such contract when made. In a New Hampshire case, *semble*, a distinction was taken between a parol authority to an agent to sign a contract already written, and one to make a contract and reduce it to writing; the former being good and the latter not, unless the authority should be a confirmation of the writing.(w) The words "to sell" only authorize an agent to find a purchaser, and not to sign the memorandum; the latter authority may be given by parol, but should be by express words.(x) On the other hand, it has been held that an agent authorized to sell is authorized to make the memorandum.(y) Verbal authority to the vice-president of a corporation to sell lands will be good where there is acquiescence.(z) Parol evidence is admissible on

Oral authority to contract as to land.
Land.

284; *Newton v. Bronson*, 3 Kern. 593; *Worrall v. Munn*, 1 Seld. 239; *Moody v. Smith*, 70 N. Y. 599; *Dykers v. Townsend*, 24 N. Y. 59; *Blacknall v. Parish*, 6 Jones's Eq. 73; *Fisher v. Bowser*, 41 Tex. 223; *Huffman v. Cartwright*, 44 Tex. 299; *Yerby v. Grigsby*, 9 Leigh, 387; *Dodge v. Hopkins*, 14 Wis. 639; *Smith v. Armstrong*, 24 Wis. 449.

(g) *Lusk v. Hope*, 17 Low. Can. Jur. 20; *Lynn v. Cochrane*, 23 Low. Can. Jur. 238 (Q. B.). This result is affected, however, by the existence there of a Statute of Frauds.

(r) *Smith v. Taylor*, 10 Robins. 135.

(s) *Gore v. McBrayer*, 18 Cal. 589; so

to effect the extinguishment of a mortgage, *Reed v. Marble*, 10 Paige, 410.

(t) *Patterson v. Keystone Co.*, 30 Cal. 363.

(u) *Gracie v. White*, 18 Ark. 18.

(v) *Miles v. Cook*, 1 Grant (Pa.), 59.

(w) *Hodgkins v. Bond*, 1 N. H. 84.

(x) *Duffy v. Hobson*, 40 Cal. 244; *Coleman v. Garrigues*, 18 Barb. 68; see *Rutenberg v. Main*, 47 Cal. 219.

(y) *Yerby v. Grigsby*, 9 Leigh, 387.

(z) *Chicago, etc., R. R. Co. v. James*, 22 Wis. 199; see *Dominion Bank v. Knowlton*, 25 Grant, 131, citing *London Dock Co. v. Sinnott*.

behalf of the principal to prove that land bought by the defendant was bought as agent; and there being a conveyance no question of trust arose, and the 7th section of 29 Car. II., c. 3, did not apply.(a) As to purchase by an agent creating a trust, see chapter on Trusts; and see *McDonald v. Fithian*, 6 Ill. 295. Verbal authority to the agent to contract, and a verbal contract by him, are taken out of the Statute of Frauds by part performance.(b) The parol evidence of authority to contract for the sale of land must be clear and explicit.(c) The agent is a competent witness to prove his agency as between his principal and a third person.(d) In a Pennsylvania case it was said that "it is one of the most common of all events to call the agent to give evidence of his authority."(e) Where the contract to be executed was not within the Statute of Frauds the agent can himself prove his authority.(f)

§ 380. Authority to contract for sale, etc., of land must now, by statute in Alabama, be proved by written evidence.(g) So in Illinois,(h) Michigan,(i) Nebraska,(j) New Hampshire.(k) Parol proof of authority to contract for the sale or purchase of land has been rejected, even in the absence of any statute expressly requiring written evidence of it.(l) The assent of the owner of land to its

(a) *Cave v. McKenzie*, 46 L. J. Ch. 565; 37 L. T., N. S. 218.

(b) *Rutherford v. Sargent*, 71 Ill. 342; *Bayer v. Cockerill*, 3 Kans. 293; see *infra*, § 382.

(c) *Proudfoot v. Wightman*, 78 Ill. 553.

(d) *Collins v. Smith*, 18 Ill. 162.

(e) *Miles v. Cook*, 1 Grant (Pa.), 59 (citing cases); see, however, *Nicholson v. Mifflin*, 2 Yeates, 38, where the rule was said to be one of mercantile law, and not to extend to land.

(f) *McGunnagle v. Thornton*, 10 S. & R. 252.

(g) *Hutton v. Williams*, 35 Ala. 515 (distinguishing *Ledbetter v. Walker* as being before the Statute); *Bullard v. Johns*, 50 Ala. 383 (applied to going

security for the costs of an appeal); *Jenkins v. Harrison*, 66 Ala. 353.

(h) *McDonald v. Fithian*, 6 Ill. 295; *Rockford R. R. v. Shunick*, 65 Ill. 228; *Bissell v. Terry*, 69 Ill. 190; *Albertson v. Ashton*, 102 Ill. 56.

(i) *Holland v. Hoyt*, 14 Mich. 238; *Hanchett v. McQueen*, 32 Mich. 24; *Colgrove v. Solomon*, 34 Mich. 499.

(j) *Morgan v. Berger*, 3 Neb. 213 (denying *McWhorter v. McMahan*).

(k) *Grafton v. Cummings*, 99 U. S. 106.

(l) *Marshall v. Haney*, 9 Gill, 259 (query); *Mumford v. McKinnie*, 21 La. Ann. 547; *Seaton v. Sharkey*, 3 La. Ann. 332; *Breed v. Guay*, 10 Robinson, 36; see, however, *supra*.

being publicly sold must be evidenced by a writing, or be admitted.(m) In an early decision in the Irish King's Bench there were *dicta* that the authority of an agent to make a binding contract under the Statute of Frauds should be in writing.(n) In Pennsylvania, where the 3d section of 29 Car. II., c. 3, which requires the agency to be in writing, is in force, and where that clause of the fourth section relating to land is not, it has been held that in order to establish even an equitable title in the land the agency must be proved by a writing.(o) Where, however, damages only under the peculiar Pennsylvania rule, and not specific performance, are sought, the agency can be proved by parol.(p) It was, however, said in a Pennsylvania case that "there is no statute that directly or indirectly requires that an agent shall be constituted by writing, except when he is to convey an estate for a longer period than three years."(q) One partner can, *semble*, authorize verbally his fellow-partner in a matter relating to the sale of land.(r) And where the authority is reduced to writing by the principal it is enough, though not signed by the latter.(s) Parol authority to make agreement of lease is sufficient;(t) the provision of the 1st and 3d sections of 29 Car. II., c. 3, applying only to actual leases;(u) this provision being omitted from the Statute of Frauds of Tennessee, authority to execute a lease can in that state be given by parol;(v) so in Illinois.(w) So in case of leases for less than three years in Pennsylvania, being excepted from the Statute.(x)

(m) *Pew v. Livaudais*, 3 La. An. 460; *Twitchell v. Philadelphia*, *supra*; see see *Pepper v. The Commonwealth*, 6 "Land." Mon. 30.

(n) *Jack v. Alexander*, Rowe, 501.

(o) *Nicholson v. Mifflin*, 2 Yeates, 38 (citing *Girard v. Krebs* and *Meredith v. Macoss*); *Parrish v. Koons*, 1 Pars. Eq. 79 (citing cases); *Twitchell v. Philadelphia*, 33 Pa. St. 220 (citing cases); *Van Horne v. Fricke*, 6 S. & R. 90.

(p) *Grayson v. Bannon*, 8 Watts, 528 (citing cases); *Ewing v. Tees*, 1 Binn. 450 (distinguished on this ground in *Parrish v. Koons*); *semble*, also,

(q) *Miles v. Cook*, 1 Grant (Pa.), 59.

(r) *Bonner v. Campbell*, 48 Pa. St. 289; *McGill v. Dowdle*, 33 Ark. 314.

(s) *Nicholson v. Mifflin*, 2 Yeates, 38.

(t) *Rice v. O'Connor*, 12 Ir. Ch. 433; *Callaghan v. Pepper*, 2 Ir. Eq. 401.

(u) *Callaghan v. Pepper*, *supra*.

(v) *Johnson v. Somers*, 1 Humph.

269.

(w) *Lake v. Campbell*, 18 Ill. 109.

(x) *McGunnagle v. Thornton*, 10 S. & R. 252.

§ 381. Authority to demand assignment of dower may be given by parol.(y) Parol leave from the mortgagee of personal property to the mortgagor to sell it is good,(z) and authority to transfer personalty need not be under seal.(a) Verbal authority to make a contract as to chattels is valid by parol.(b) So of a purchase of shares of stock.(c) Verbal authority to execute a guaranty is sufficient.(d) So for the maker of a promissory note to endorse on behalf of the payee;(e) or acting for the principal to draw a bill of exchange on a third party,(f) to fill up a guaranty.(g) But a parol authority to a magistrate to put the principal down as surety in a stay of execution is void.(h) In Kentucky authority to execute a memorandum of guaranty must be in writing.(i) Oral authority to make a contract in consideration of marriage is good.(j) Authority for one partner to act for another can, as a general rule, be orally given.(k) This rule applied to a case of guaranty.(l) It has been said, that "the general rule undoubtedly is, that an authority to bind another by an instrument under seal must itself be created by a like instrument; and it was upon this rule, and for the want of any such authority here, that the court below held this mortgage invalid; but an exception to this rule seems to have been established in the case of partners,

(y) *Baker v. Baker*, 4 Me. 70; *Lothrop v. Foster*, 51 Me. 367.

(z) *Shearer v. Babson*, 1 Allen, 486.

(a) *Van Ostrand v. Reed*, 1 Wend. 431.

(b) *McBlaine v. Cross*, 25 L. T., N. S., 804; *Shaw v. Nudd*, 8 Pick. 12; *Chapman v. Partridge*, 5 Esp. 257; *Lawrence v. Gallagher*, 73 N. Y. 613; 42 N. Y. Superior, 318.

(c) *Stover v. Flack*, 41 Barb. 169; *Richey v. Garvey*, 10 Ir. L. Rep. 544.

(d) *Martin v. Duffey*, 4 Phila. 75; see *Travis v. Scriba*, 12 Hun, 393.

(e) *Turnbull v. Trout*, 1 Hall, 340.

(f) *Van Reimsdyk v. Kane*, 1 Gallis. 638.

(g) *Ulen v. Kittredge*, 7 Mass. 235.

(h) *Caperton v. Gray*, 4 Yerg. 564.

(i) *Ragan v. Chenault*, 78 Ken. 546.

(j) *Hamersley v. De Biel*, 12 C. & F. 73 (Dom. Proc.), affirming S. C. below before the Master of the Rolls; 3 Beav. 469; and before the Lord Chancellor; 12 Cl. & F. 63 (note); a wife is not bound under the Statute of Frauds upon a memorandum of her sale signed by the husband, but not by herself); *McClung v. McCracken*, 18 Can. Law Jour. 443.

(k) *Lawrence v. Taylor*, 5 Hill (N. Y.), 107; *Sanborn v. Flagler*, 9 Allen, 474; *Johnston v. Cowan*, 59 Pa. St. 280; *Kyle v. Roberts*, 6 Leigh, 495; *McGill v. Dowdle*, 33 Ark. 314.

(l) *Duncan v. Lowndes*, 3 Campb. 474.

and it has been held that they may give each other authority by parol to bind each other by instruments under seal. Some of these cases, it is true, relate merely to personal contracts, and not to conveyances of real estate. But if the principle be once established that a partner may give his copartner authority by parol to bind him by instruments under seal, it must extend as well to instruments affecting real estate as to others. And in *Harrison v. Jackson*, 7 Term Rep. 207, where the question was whether the relation of partnership gave such authority, Lord Kenyon said that, if the authority existed, it "would extend to the case of mortgages."^(m) In a case in Maine it was considered to be well settled that, where an instrument executed by one of a copartnership in the name of the firm, and to which one seal only was affixed, it is sufficient to bind the firm, there being also parol evidence of subsequent ratification.⁽ⁿ⁾ In an Iowa case it was said, that the doctrine of the English courts is, that a sealed instrument, when made by one partner for the others, can only be made valid by a prior authority or subsequent ratification, evidenced by writing, under seal. This rule, however, is not followed in this country, it being well settled by the current of decisions that a prior authority or subsequent ratification, express or implied, verbal or written, is sufficient to make the deed binding upon the firm.^(o) The power of a corporation to constitute an agent by parol is too large a one and too remote from the scope of the present work to be entered into. See *supra*.

§ 382. There appears to be an irreconcilable conflict between the decisions as to how far the ratification of an agent's act must be in writing, and every view that can be taken of the subject has some support; parol ratification of an act has been held good when the original authority to do the act would have been required to be in writing; and, on the other hand, where a parol authority would have been good, the ratification has been required to be in writing. The following three propositions will probably leave the fewest inconsistent cases: I. Where the authority

(m) *Wilson v. Hunter*, 14 Wis. 686 (citing several cases).

(n) *Pike v. Bacon*, 21 Me. 287.

(o) *Haynes v. Seachrest*, 13 Ia. 458, citing Story on Part., § 122 and n. 2.

is required to be in writing the ratification must be evidenced in the same way ;(p) see *contra*, however.(q) II. Except where the beneficiary of the agent's contract has partly performed, or where the principal's ratification has been evidenced by acts amounting to estoppel, and the acceptance of the part performance amounts to a conclusive ratification.(r) III. And where the authority is good by parol, the ratification is also.(s) It has, however, been held, in New York, that the ratification of a contract within the Statute of Frauds must itself be in writing.(t) So in Maine in the case of a contract to sell land.(u)

(p) McDowell v. Simpson, 3 Watts, 129; Parrish v. Koons, 1 Pars. Eq. 95; Haydock v. Stow, 40 N. Y. (1 Hand) 363; Videau v. Griffin, 21 Cal. 391; Gill v. Phillips, 6 Martin, N. S. 302; Adams v. Gaynard, 5 Martin, N. S. 250; Hudnall v. Watt, 8 La. Ann. 6; and the cases below which support the proof on the principle of part performance; but see *contra*, Mumford v. McKinney, 21 La. Ann. 547 (where, however, there was part performance).

(q) Grady v. Robinson, 28 Ala. 304 (an agency by a partner); Holland v. Hoyt, 14 Mich. 238.

(r) Smith v. Armstrong, 24 Wis. 449; Purcell v. Potter, Anth. N. P. 311; Hanchett v. McQueen, 32 Mich. 24; see Mumford v. McKinney, 21 La. Ann. 547; Chicago R. R. v. James, 22 Wis. 199; Van Horne v. Fricke, 6 S. & R. 90; Pepper v. Commonwealth, 6 Mon. 30 (where the case failed through the insufficiency of the proof of part performance; see Rice v. O'Connor, 12 Ir. Ch. 433; 7 Ir. Jur., N. S. 112; 11 Ir. Ch. 514, where though a parol ratification would have been sufficient, the part performance seems to have been taken as corroborative; see, also, Rutherford v. Sargent, 71 Ill. 342; Bayer v. Cockerill, 3 Kans. 293.

(s) Graham v. Dixon, 4 Ill. 117 (the Illinois Statute of Frauds at that time not requiring written authority); Love

v. Cobb, 63 N. Car. 327; Callaghan v. Pepper, 2 Ir. Eq. 401; Rice v. O'Connor, 12 Ir. Ch. 433; 7 Ir. Jur., N. S. 112; 11 Ir. Ch. 514; Lawrence v. Taylor, 5 Hill (N. Y.), 112; Newton v. Bronson, 3 Kern. 593; Travis v. Scriba, 12 Hun, 393; but see below Soames v. Spencer, 1 D. & R. 32; Duncan v. Lowndes, 3 Campb. 479; *semble*, Maclean v. Dunn, 4 Bingh. 726 (citing cases); Kemper v. Ewing, 25 Gratt. 431; Pike v. Bacon, 21 Me. 287; Hammond v. Hannin, 21 Mich. 382; *semble*, Lawrence v. Gallagher, 73 N. Y. 613; 42 N. Y. Superior, 318; Smith v. Armstrong, 24 Wis. 449. Most of the above cases related to land; Soames v. Spencer, Maclean v. Dunn, were contracts relating to chattels; Travis v. Scriba, Duncan v. Lowndes, to guaranties, and Pike v. Bacon to partnership agency.

(t) Haydock v. Stow, 40 N. Y. (1 Hand) 370; *semble*, also, Squier v. Norris, 1 Lansing, 284 (there, however, the memorandum made by the agent was held to be incomplete in not having named the principal; the parol evidence of ratification was introduced, not merely to establish the fact of the agency, but to supplement the defective memorandum).

(u) Paine v. Tucker, 21 Me. 146 (criticizing Blood v. Goodrich); see Stetson v. Patten, 2 Me. 360 (a case of a deed made by an agent).

The rule that a parol ratification is good where a parol agency is good, applies as well under the Statute of Frauds as in other cases.(v) A parol ratification to be valid must be supported by a previously existing agency; and therefore where an agent contracted by writing to sell certain land as the property of W., and the defendant hearing of this, and claiming to own the lands, agreed to sell as arranged by W.'s agent, this is not a ratification, but a new promise, the agent, previous to the defendant's promise, having been a stranger to him in the matter. Where the vendor's agent made an invalid sale of land, and the vendor gave the agent's vendee a title-bond, the latter had a better equity than one to whom the vendor himself verbally sold it before giving the title-bond, though after the agent's sale, and to whom he gave a deed.(w) But where there was a joint interest a ratification by one is good, though he did not know of the sale being made.(x) Where there has been an imperfect writing professing to bind two vendors, the vendee cannot assent so as to bind the one vendor who gave the agent authority to make the memorandum.(y) Where one partner executed a note in the partnership name, and the defence was that it was not such a note, but was really given for the private debt of the partner executing it, oral evidence of a promise by the other partner, the defendant, to pay it, is admissible for the purpose of rebutting this defence.(z) But a written promise by a married woman to buy land invalid, because of her coverture, cannot under the Statute of Frauds be ratified by an oral promise when she became discoverte.(a) Where there is a written ratification it must show all the terms of the contract.(b) Where the declaration stated a con-

(v) *Lawrence v. Taylor*, 5 Hill (N. Y.) 112. N. S., 1215; 3 E. & E., 772; 8 W. R., 750 (Dom. Proc.); 27 L. J. Q. B., 143;

(w) *Hunter v. Bales*, 24 Ind. 299; *sub nom. B. v. F.*, 8 E. & B. 675 (Seacc. Cam.); 6 E. & B., 873; 3 Jur., N. S., 264; 4 Jur., N. S., 506 (Q. B.).

(x) *Soames v. Spencer*, 1 D. & R. 32.

(y) *Snyder v. Neefus*, 53 Barb. 66.

(z) *McGill v. Dowdle*, 33 Ark. 314.

(a) *Chaney v. Flynn*, 2 Kent, Law Reporter (Ct. of App. Ky.), 417.

(b) *Fitzmaurice v. Bayley*, 9 H. of L. Cases, 78; 3 L. T., N. S., 69; 6 Jur.

This case raises some difficult points as to what constituted a ratification under the circumstances. The plaintiff, Fitzmaurice, owned a lease of a house, Hamilton Lodge, expiring in five years, and of certain stables (in

tract by three, viz., two and the wife of one of them, and the evidence showed a written agreement by an agent who had

Gore Street) from a different landlord, expiring in seven years from the date of the transaction in dispute. One Rearden, agent for the defendant, Bayley, negotiated with the plaintiff for an assignment of the lease of the house, and a memorandum in the shape of a letter from the plaintiff, not dated, but made August 30th, gave certain particulars as to the house, but did not mention the stables. Rearden made a part payment, and got a written receipt therefor. Afterwards, August 31st, the plaintiff by a letter agreed to let the defendant have the stables for the same rent and subject to the same "conditions" (or "condition," the writing not being clear) "as I hold them myself." On September 14th the plaintiff, having been told by Rearden that the defendant had never received the letter of August 31st, inclosed a copy of it to him, and, among other things, said, "as it was proposed taking the stables for five years only, I cannot give you an assignment of my lease for seven;" the defendant, in reply, September 15th, wrote, saying that he had never thought of taking the stables, that the only letter he had seen seemed to be that of August 30th, but added "whatever it is, it will speak for itself, and I am fully prepared to carry it out." On September 18th the defendant wrote the plaintiff, reiterating his opinion, that the only letter shown him was that of August 30th, but added, "the agreement however, whatever it is or whatever its date, Mr. Rearden has, and, as I observed in my former letter, whatever it is, I shall carry it out;" added that if taking the stables was part of the agreement to take the house he would stand by this; but if

not, he wished to examine the stables before agreeing to take them.

In the Queen's Bench the court having ruled that Rearden had had no prior authority to contract for the stables, but that, if Rearden's contract as actually made included the stables, there was sufficient evidence of ratification to bind defendant, and the jury having found that the contract made by Rearden included the stables. The court, Campbell, Wightman, and Erle, refused a nonsuit; Crompton, J., dissenting. The ground was that there was a general ratification by defendant with knowledge of the facts.

In the Exchequer Chamber the Queen's Bench was reversed, and a nonsuit ordered, on the ground that, apart from the question of ratification, there was no memorandum describing the duration of the lease of the stables; that the term could not have been plaintiff's entire interest for seven years, for his letter disavows such an idea; that if the agreement was for a lesser period, the point of beginning of the term was not shown, and that the memorandum did not indicate in any way a lease from year to year, and that therefore there was no good in allowing an amendment; that this point of the failure of the memorandum to indicate the duration of the term could be taken for the first time in error, for it was only a new detail of what was substantially the defence from the outset, *i. e.*, the want of a sufficient memorandum under the Statute of Frauds. The House of Lords, the judges being summoned, affirmed the Exchequer Chamber, Wightman, J., and Campbell, L. C., diss.

That the memoranda, especially

authority from one and from the wife, but not from the latter's husband, who however received part of the consideration due under the contract, there was held to be a fatal variance.^(c) Where a vendee of land agreed to pay for it by a note endorsed by three people, two of whom signed, and the vendee without authority promised that the third would sign, the latter subsequently did so, and, having to pay the note, sued the vendor, who was the payee of the note, to recover the amount on the ground that the vendee's promise was invalid, and that the plaintiff's ratification of it was without consideration, it was held that the endorsement of the note was a sufficient ratification, and that the Statute of Frauds did not apply.^(d) It is a question of fact for the jury, whether the vendor has accepted

the plaintiff's letter of August 31st, were invalid under the Statute of Frauds, as not showing the duration of the lease of the stables, per Hill, J., Byles, J., Crompton, J.; Pollock, C. B.; Lord Cranworth, Lord Chelmsford, and Bramwell, B. That the length of the term might be all the rest of plaintiff's term, *i. e.*, seven years, or five years, or a lease from year to year. Bramwell, B., and Lord Chelmsford. That there was no concluded contract even by parol made by the plaintiff and Rearden, per Bramwell, B., Pollock, C. B., and Lord Chelmsford. That a written ratification of a parol contract must show all the terms, per Byles, J. That the defendant's letters of September 15th and 18th, referred to the plaintiff's letter August 30th, and not to that of August 31st. Crompton, J., Pollock, C. B., Lord Cranworth, Lord Chelmsford; *semble*, also, Byles, J. That the ratification meant that the defendant was willing to be bound by whatever was in the memoranda which he had seen, per Bramwell, B., Pollock, C. B., and Crompton, J. That the defendant's ratification was meant only as far as Rearden had bound himself, per Lord Chelmsford.

Query: One memorandum is for the purpose of the Statute of Frauds, sufficiently referred to in another memorandum; if the latter adopts the former only upon a condition which is provable solely by parol evidence, the condition in this case being that, if Rearden really agreed by a certain paper to take the property, the defendant would adopt his contract, per Crompton, J.

That the part payment was under the agreement of August 30th, not under that of August 31st.

Wightman, J., dissenting: thought that the term for the stables agreed on was for five years, beginning at the same time with the lease for the house, and that the memoranda and the circumstances together showed this sufficiently to satisfy the Statute of Frauds. Lord Campbell, L. C., adopted these reasons, and thought that under the circumstances, and after giving his general ratification, the defendant could not defend on the ground that the evidence of the duration of the term was not such as to satisfy the Statute.

(c) *Saunderson v. Griffiths*, 5 B. & C. 915.

(d) *Berryhill v. Jones*, 35 Iowa, 339.

a memorandum made by one professing to be his agent,^(e) and ratification generally is a question of fact for the jury.^(f) //

§ 383. The ratification of an agent's deed must be by deed.^(g)

Ratifica-
tion by
deed gen-
erally;
partnership-
transac-
tions.

In another case, in Tennessee, it was said that the rule laid down in *Turbeville v. Ryan*, 1 Humph. 113, and followed by this court in *Smith v. Dickinson*, 6 Humph. 261, is that to authorize the execution of a deed in the name of another the authority must be by deed, and no previous parol assent or subsequent adoption will bind the party, unless it be acknowledged and redelivered.^(h) Where a demise under seal was void because made by an agent not authorized by a specialty, an oral demise followed by occupancy will be good because of the part performance.⁽ⁱ⁾ The general rule is applied to sealed contracts to sell land, and *vide supra*.^(j) Where a deed is accepted, though not signed, by the principal, he is bound in assumpsit, but not in covenant.^(k) Verbal ratification is a corroboratory circumstance when an agent has made a deed, when a simple contract would have been sufficient, *vide supra*.^(l) In a South Carolina case the court was equally divided on the main contention of this section.^(m) In a Scotch case where the memorandum was written by another, and the party to be charged wrote, "I hereby adopt the above holograph," it was held that the law was complied with.⁽ⁿ⁾ But where a written agreement to give a lease signed by procuration and not properly witnessed, and there is no letter of authority to the agent signing, is insuffi-

—(e) *Hawkins v. Chace*, 19 Pick, 504; agency generally is for the jury; *Norris v. Cooke*, 7 Ir. C. L. 41.

(f) *Lawrence v. Gallagher*, 73 N. Y. 613; 42 N. Y. Superior, 318.

—(g) *Smith v. Dickinson*, 6 Humphr. 261.

(h) *McNutt v. McMahan*, 1 Head, 101; citing, also, *Mosby v. State of Arkansas*, 4 Sneed, 324.

(i) *Purcell v. Potter*, Anthon. N. P. 311.

(j) *Paine v. Tucker*, 21 Me. 146 (criticizing *Blood v. Goodrich*); but see, *contra*, *Grady v. Robinson*, 28 Ala.

304; and see *Schuetze v. Bailey*, below, and *vide supra*.

(k) *Swisshelm v. Swissvale Laundry Co.*, 11 Pittsb. Leg. Journ., N. S. 184; 95 Pa. St. 367.

(l) *Schuetze v. Bailey*, 4 Mo. 74.

(m) *Wallace v. McCullough*, 1 Rich. Eq. 438.

(n) *Gavine v. Lee*, 20 Sc. L. Report. 302, citing *M'Intyre v. M'Farlane*, F. C., March 1, 1821; *Christie's Trustee v. Muirhead*, 8 Macph. 461; *Maitland's Trustees v. Maitland*, 9 Macph. 79, and other cases.

cient, though the principal signed as a witness to his agent's signature.(o) In Massachusetts the deed of a partner is an established exception to this view; said the court in a recent case, speaking of *Merrifield v. Parritt*, 11 Cushing, 590: In that case the agreement was not under seal; and the defendant contends that a sealed instrument, executed without previous authority, can be ratified only by an instrument under seal. However this may be elsewhere, by the law of Massachusetts such instrument may be ratified by parol. The cases in which this doctrine has been adjudged were those in which one partner, without the previous authority of his co-partners, executed a deed in the name of the firm. But we do not perceive any reason for confining the doctrine to that class of cases.(p) This exception is extended to a deed by an individual(q) As to memorandum by sheriff, or auctioneer, etc., acting as agent, see "Public Sales"; as to fraud of agent in buying for himself, see "Trusts."

(o) *Bell v. Goodall*, 20 So. Law Re- also, in Alabama, *Herbert v. Hanrick*,
port. 600. • 16 Ala. 589; *Gunter v. Williams*, 40

(p) *McIntyre v. Park*, 11 Gray, 106 Ala. 572; see, also, *Haynes v. Sea-*
(citing several cases); *Holbrook v. chrest*, 13 Ia. 458, citing *Story on Part.*,
Chamberlin, 116 Mass. 161; *Swan v. § 122*, and n. 2.

Stedman, 4 Metc. (Mass.) 551; so, (q) *Holbrook v. Chamberlin*, *supra*.

CHAPTER XVI.

THE EXECUTION OF THE MEMORANDUM—SIGNATURE
AND OTHER DETAILS OF EXECUTION.

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|---|--|
| § 384. Signature generally; place of signature.
§ 385. Signature in any part of the instrument; subscription.
§ 386. Lead-pencil; initials; mark; printing.
§ 387. Acceptance of the memorandum: deed. | § 388. Delivery of deed in escrow.
§ 389. Undelivered deed, how far a valid memorandum.
§ 390. Acceptance of the memorandum generally; to whom the memorandum is addressed.
§ 391. Further considerations as to acceptance of memorandum. |
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§ 384. THE memorandum to satisfy the Statute of Frauds must, as has been repeatedly said, be signed; a writing without more is not enough; (a) alterations in the draft of a contract of sale of land, though in the defendant's handwriting, are not equivalent to a signature. (b) A letter beginning "My dear Robert," and signed "believe me the most affectionate of mothers," is not signed so as to comply with the Statute of Frauds. (c) The rule as to the signature required is the same both under the 4th and 17th sections of the Statute. (d) Sealing is not a sufficient signing of a will. (e) The fact of signature may be proved by parol. (f) Whether the name of the party sought to be charged, written by himself or by his agent, is to be

(a) *Bawdes v. Amhurst*, Prec. Ch. 402; a memorandum to comply with 6 Geo. IV., c. 16, § 131, must be signed; if you could identify the writer.

Hubert v. Moreau, 12 Moo. 216.

(b) *Hawkins v. Holmes*, 1 P. Wms. 771; see for writing sufficient without

signature, *Lemayne v. Stanley*, 3 Lev. 1; *Fall River Whaling Co. v. Borden*,

10 Cushing, 471; and see *supra*. (c) *Smith v. Evans*, 1 Wils. 313.

(c) *Selby v. Selby*, 3 Mer. 4, Sir Wm.

(d) *Higdon v. Thomas*, 1 H. & G. 145; *McComb v. Wright*, 4 Johns. Ch. 661.

(e) *Smith v. Evans*, 1 Wils. 313.

(f) *Pignatell v. Drouet*, 6 Martin, 440.

treated as a signature is often a point of much doubt. The principles by which a signature is to be tested were discussed at length in the House of Lords on the appeal in the case of *Caton v. Caton*, and it was held that a memorandum was not sufficiently signed which was only a draft of a marriage settlement, written by the intended husband, giving the names, and in other places the initials, of himself and the lady who afterwards became his wife, and beginning with the words "in the event of a marriage between the undermentioned parties." It was said that the signature must be intended to govern the whole agreement which it should authenticate, and that in the particular case the names of the parties could not be connected with the phrase "in the event of a marriage," etc., so as to make the names signatures.^(g) The signature, if inserted in such a manner as to authenticate the writing, may be in any part of the latter.^(h) Where the defendant *Moore*, a lessor, wrote to his solicitor instructions as to the lease, and said "the lease renewed, Mrs. Stokes to pay, etc., and also to pay *Moore* £24 a year," etc., it was held that the word "*Moore*" here was not a sufficient signature, and that the agreement was not final.⁽ⁱ⁾ Where a person signs as a witness, the signature must show that he knew the contents of the writing, and this fact can be proved by parol.^(j) Lord Hardwicke had said generally that the signature as a witness was sufficient.^(k) In a late case where the chairman of a corporation signed the draft of a contract accepted at a meeting, it was held that the fact that the signature was made with a view of complying with the company's act,

(g) L. R. 2 H. L. 135; 36 L. J. Ch., 886; 16 W. R., 1 (in Dom. Proc.), affirming *Cranworth*, L. C., 35 L. J. Ch. 292; L. R. 1 Ch. App. 146, reversing *Stuart*, V. C., L. R. 1 Ch. App. 140; 34 L. J. Ch. 564.

(h) *Ogilvie v. Foljambe*, 3 Meriv. 60.

(i) *Stokes v. Moore*, 1 Cox, Ch. 221 (said in *Higdon v. Thomas*, 1 H. & Gill, to have been doubted by Lord Eldon, and the signature said to have been made for a particular purpose, and not

generally to authenticate the agreement).

(j) *Gosbell v. Archer*, 2 A. & Ell. 503; 4 N. & M. 494, distinguishing *Coles v. Trecothick* on the ground just stated.

(k) *Welford v. Bezely*, 3 Atk. 503; 1 Wils. 118, distinguishing *Bawdes v. Amhurst* as an incompleting contract; see *Lang v. Nevill*, 6 Jur. 217 (where a signature, *semble*, as witness, was held insufficient).

and not especially to identify the contract, did not make the signing less binding.^(l) The vendor's broker wrote a memorandum and sent it to the vendee; the latter made an interlineation in red ink and signed it; the vendor's broker refused to agree and struck out the interlineation; this was assented to by the vendors, who made further alterations; and parol evidence to show that the vendee assented to it in its final state was admitted; and it was said that there was no agreement till the vendee finally assented; that his signature took effect at that date, and that the evidence was not inadmissible for impeaching a writing, because there was no writing.^(m) The place in the writing in which the name is found and its immediate context are of importance in determining whether the name should be treated as signature. A signature at the top is sufficient.⁽ⁿ⁾ A memorandum beginning, "I., J. S., promise," etc., is well signed.^(o) The defendant, Cripps, wrote a letter which he did not sign, but, as the letter was headed with "From Richard Cripps," in print, with his address, the signature was held sufficient.^(p) A letter beginning "Mr. Stanley" (the defendant) "begs to inform Mr. Lobb" (the plaintiff), etc., complies with 6 Geo. IV., c. 16, § 131 (requiring written evidence of promise to pay debts discharged by bankruptcy).^(q) The defendant's testator authorized his son to make a memorandum, and the latter wrote, "Mr. J. P. Thomson" (the defendant's testator) "proposes to pay down the sum of, etc.," and this was regarded as sufficiently executed, and with a letter from J. P. Thomson recognizing it, was certainly enough.^(r)

(l) *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 321; 46 L. J. Q. B., 219; 36 L. T., N. S. 144.

(m) *Stewart v. Eddowes*, L. R. 9 C. P. 313; 43 L. J. C. P., 204 (a fuller report).

(n) *Penniman v. Hartshorn*, 13 Mass. 87; *Sayers v. Patterson*, 2 W. N. Cas. 334; *Johnson v. Dodgson*, 2 M. & W. 653; *Bleakley v. Smith*, 11 Sim. 150; *Knight v. Crawford*, 1 Esp. 190.

(o) *Taylor v. Dobbins*, 1 Str. 399; *Sayers v. Patterson*, 2 W. N. Cas. 334.

(p) *Torret v. Cripps*, 27 W. R. 706;

S. C. *sub nom.* *Tourret v. Cripps*, 48 L. J., N. S. Ch. 567, citing *Schneider v. Norris*.

(q) *Lobb v. Stanley*, 5 Q. B. 581; see *Morrison v. Turnour*, 18 Ves. 175, and *Proper v. Parker*, 1 R. & Myl. 625; treating letters in the third person as sufficient under the Statute of Frauds.

(r) *Hamersley v. De Biel*, 12 C. & F. 73 (Dom. Proc.), affirming S. C. below before the L. C., 12 Cl. & F. 63, note, and before the M. R., 3 Beav. 469.

In an Indiana case a memorandum drawn by an agent had the defendant's name at the beginning, and was subscribed by the defendant's agent and by the plaintiff; the agent afterwards signed the defendant's name, but this not having been done in the presence of the defendant struck it out, and it was held that there is no inference when the signature is at the beginning of an instrument that it was put there at the final execution of the paper, and that the circumstances just stated showed that the name at the beginning had not been intended for a signature.^(s) Where a third person made out for the parties an inventory of sale beginning, "Invoice of articles purchased by Pipkin, etc., of, etc., James" (these being the names of the parties), and the inventory was not otherwise signed, it was held insufficient as not having been intended as a memorandum.^(t) Durrell, the plaintiff, the seller, met the buyer at the office of N., the plaintiff's factor, and, upon a bargain being agreed upon, N. signed in the presence of the parties the following memoranda:—

"Messrs. Evans

"Bought of D. T., etc., Noakes
(and giving goods and price).

"Oct. 20, 1860."

And on a stub of the book on which the above was written, N. wrote the following:—

"Sold to Messrs. Evans,

"T. Durrell (giving goods and price).

"Oct. 20, 1860."

The first of these was delivered to Evans, the defendant, the buyer, and the other retained by N. The memoranda were held to be properly signed, the place of the signature being immaterial.^(u) The entry of sale made by a sheriff, containing the name of the purchaser is as effectual a signing as if he had written the purchaser's name to a formal contract to buy.^(v) But to make the name at the beginning of the instru-

(s) *McMillen v. Terrell*, 23 Ind. 165. chequer, 4 L. T., N. S., 255; 30 L. J.

(t) *Pipkin v. James*, 1 Humphr. 326. Exch., 254.

(u) *Durrell v. Evans*, 1 H. & C. 185; (v) *Secrist v. Twitty*, 1 McMul. 255.
7 L. T., N. S., 97; 31 L. J. Exch. 337 A memorandum of agreement in the
(Seace. Cam.), reversing S. C. in Ex- form of articles, began "Articles of

ment a good signature, the writing must have been executed by the party or his agent.(w) Where a promissory note is averred to be in the defendant's handwriting, it need not be said to have been signed.(x) And where the bill stated that the agreement in which the defendant's name occurred was in the handwriting of the latter, a general demurrer was overruled, because the statements in the bill were quite consistent with there having been a sufficient signature under the Statute of Frauds.(y) A memorandum however not signed, and in which the defendant's name is not mentioned, does not comply with 6 Geo. IV., c. 16, § 131 (*supra*, n. (q)), though written by the defendant.(z) The name at the top has been regarded as sufficient even when printed and not written, as where the defendants delivered to the plaintiff a bill headed, "Bought of Jackson & Hawkins," etc., and wrote inquiring when they were to deliver the goods and asking for time.(a) Where the defendant, the vendor, took a printed memorandum headed with his own name and with blanks for the purchaser's name, etc., and wrote the latter in the blanks in his own handwrit-

agreement, etc., between Hubert, etc. (the plaintiff), and E. Treherne, etc., directors of the Equitable Gaslight Company (the defendants), etc.; whereas, the said T. Hubert has agreed with the said E. Treherne, etc., as witness our hands," but was not signed; the memorandum was prepared by the defendants' secretary under resolution of its board of directors; this was held to be insufficiently signed under the Statute of Frauds; Hubert v. Turner, 4 Scott, N. R. 505; S. C., *sub nom.* Treherne, 3 M. & G. 753, distinguishing *Saunderson v. Jackson* as a case where the memorandum was made by the defendant himself (but see 4 Scott, N. R. 506, note); the true points on which the principal case rests are the right of an agent to bind by merely reciting the defendant's name and the intention of making a further signature.

(w) *Barry v. Coombe*, 1 Pet. (U. S. S. C.), 650; *Cabot v. Haskins*, 3 Pick. 95; *People v. Murray*, 5 Hill, 470 (a certificate of a justice held good with signature at the beginning; the cases under the Statutes of Frauds and of Wills being cited).

(x) *Taylor v. Dobbins*, 1 Stra. 399.

(y) *Field v. Hutchinson*, 1 Beav. 599.

(z) *Hubert v. Moreau*, 12 Moore, 218; 2 C. & P., 528.

(a) *Saunderson v. Jackson*, 3 Esp. 181; 2 B. & Pull 239. (the fuller report); Lord Eldon went so far as to say that a memorandum beginning "I, A. B., agree, etc." might be sufficient, though there was an intention to sign below, which was never carried out; see however the next case; *Hawkins v. Chace*, 19 Pick. 502; *Lerned v. Wanemacher*, 9 Allen, 416.

ing, the printed signature was considered as sufficiently brought home to the defendant.(b)

§ 385. The signature may be in the caption, body, subscription, or, indeed, in any part of the instrument.(c) A purchaser's name in the body of the memorandum, put there by himself or his agent is a sufficient signature.(d) A bond signed by the parties in different places, one of them being wrong, was held to be good.(e) In an Illinois case, scantily reported and not relating to the Statute of Frauds, it was held that the defendant's name in the body of the instrument was not a sufficient signature to a bond.(f) Under the New York statute a subscription is necessary.(g) The word "subscribe" in the Colorado Statute

Signature in any part of the instrument; subscription.

(b) *Schneider v. Norris*, 2 M. & Sel. 288, noting that in *Saunders v. Jackson*, there was, besides the printed name, a letter signed by the defendant; see *Torret v. Cripps*, where a written contract, between H. Young & Co. and John Abrahams & Co., contained this clause: "Now it is distinctly understood between all parties to the contract that the aforesaid J. Otto Schuler guarantees the payment of all moneys due H. Young & Co., etc. etc., and this was signed by H. Young & Co., and their signature was witnessed by Charles Till; then came the following:—

P. P. A.

John Abrahams.

J. Otto Schuler.

Signed and delivered by the said John Abrahams & Co. in the presence of Charles Till.

The P. P. A. signature was made by Schuler, who at the time orally declared that he signed both for himself and for Abrahams & Co. The court held that it must be assumed that he signed in both capacities, and was, therefore, personally bound, and that oral evidence of his declaration to that effect did not contradict the writing,

and was admissible; *Young v. Schuler*, 11 Q. B. D. 653.

(c) *Merritt v. Clason*, 12 Johns. 102; *Newton v. Bronson*, 3 Kern. 593; see *Champlin v. Parish*, 11 Paige, 408; *Evans v. Ashley*, 8 Mo. 181; *Argenbright v. Campbell*, 3 Hen. & Munn. 159; *Wise v. Ray*, 3 Iowa, 430; *Higdon v. Thomas*, 1 Harr. & G. 139; *Drury v. Young*, 58 Md. 547; *Penniman v. Hartshorn*, 13 Mass. 87; *Hawkins v. Chace*, 19 Pick. 504; *Nichols v. Johnson*, 10 Conn. 198; *Barry v. Coombe*, 1 Peters, 650 (Sup. Ct.); *Cabot v. Haskins*, 3 Pick. 95; *Anderson v. Harold*, 10 Ohio, 399; *McConnell v. Brillhart*, 17 Ill. 360; *McFarson's Appeal*, 11 Pa. St. 509; *Durrell v. Evans*, 1 H. & C. 185; 7 L. T., N. S., 97; 31 L. J. Ex., 337; 4 L. T., N. S., 255; 30 L. J. Ex. Ch., 254.

(d) *McComb v. Wright*, 4 Johns. Ch. 661.

(e) *Argenbright v. Campbell*, 3 H. & Mun. 159.

(f) *Thomas v. Caldwell*, 50 Ill. 140.

(g) *Newton v. Bronson*, 3 Kern. 593; *Viele v. Osgood*, 8 Barb. 132; *Champlin v. Parish*, 11 Paige, Ch. 408; *Coles v. Bowne*, 10 Paige, Ch. 535; *Davis v. Shields*, 26 Wend. 347; *James v. Patton*, 2 Seld. 9; *Spear v. Hart*, 3 Rob.

of Frauds means, as distinguished from the word "sign" in 29 Car. II., c. 3, that the signature shall be at the end of the written or printed instrument.^(h) Writing the name of the party in the body of the paper was held in one case to be a sufficient "subscription;"⁽ⁱ⁾ but *quære* whether an invoice with a printed billhead giving the name of the party is "subscribed."^(j) It is sufficient under the Wisconsin statute (R. S., § 2302, § 2308, etc.) for the complaint to state a contract to have been "executed" without stating it to have been "subscribed."^(k)

§ 386. A lead-pencil signature is enough.^(l) If not intended to be merely deliberative,^(m) a lead-pencil endorsement of a promissory note has been held good.⁽ⁿ⁾ So a will.^(o) So an application for insurance.^(p) In the case of a deposition written in lead-pencil the court, while not passing upon the point, declared that they must not be understood as necessarily following, under such circumstances, the cases under the Statute of Frauds.^(q) Initials are a sufficient signature.^(r) Where the

420; Kuhn v. Brown, 1 Hun, 246; see Mutual Ins. Co. v. Ross, 10 Abb. Pr. 260 (note), discussing the word "subscription;" so in Alabama, Bickley v. Keenan, 60 Ala. 295.

(h) Coon v. Rigden, 4 Col. 282, citing cases.

(i) Hubbell v. Livingston, 1 Code Rep. (N. Y.) 63 (N. Y. Supr. C.); see, also, Roberts v. Phillips, 4 E. & B. 450.

(j) Bacon v. Eccles, 43 Wis. 233.

(k) Cheney v. Cook, 7 Wis. 423.

(l) Lucas v. James, 7 Hare, 418; Bailey v. Ogden, 3 Johns. 418; Clason v. Bailey, 14 Johns. 486; Pinckney v. Hagadorn, 1 Duer, 95; Merritt v. Clason, 12 Johns. 102; Jenkins v. Hogg, 2 Const. (So. Car.) 835; McDowel v. Chambers, 1 Strob. Eq. 347; so the memorandum generally, Sherburne v. Shaw, 1 N. H. 159; Hill v. Scott, 12 Pa. St. 169; Geary v. Physic, 5 B. &

C. 234; 7 D. & R., 653; Case of Simson and Others, 20 Scotch L. Report. 831; Ryan v. Salt, 3 U. C. C. P. 87; see 10 West. Law Jour., 147; 12 Alb. L. J., 195.

(m) Hill v. Scott, 12 Pa. St. 169; Clason v. Bailey, 14 Johns. 486; Merritt v. Clason, 12 Johns. 102; Jenkins v. Hogg, 2 Const. (So. Car.) 835; McDowel v. Chambers, 1 Strob. Eq. 347.

(n) Closson v. Stearns, 4 Vt. 11; Brown v. Butcher's Bank, 6 Hill, 443.

(o) Myers v. Vanderbilt, 84 Pa. St. 455, citing many cases; Philbrick v. Spangler, 15 La. Ann. 46.

(p) City Ins. Co. v. Bricker, 91 Pa. St. 490.

(q) People v. White, 22 Wend. 174.

(r) Sanborn v. Flagler, 9 Allen, 474 (even by one partner to bind the other); Palmer v. Stephens, 1 Denio, 478.

defendant signed his initials to a written promise, addressed to "M. A.," whom the declaration stated to be Mary Ann Williams, the memorandum was held sufficient under a demurrer to the declaration, as Mary Ann Williams might be proved to be the plaintiff.(s) In a case in Campbell's Reports Lord Ellenborough held that the initials of the defendant's agent written by the auctioneer in the catalogue, coupled with the letter recognizing the sale, constituted a sufficient memorandum in writing to satisfy the Statute of Frauds;(t) a mark is a sufficient signature;(u) or any figure or designation intended to bind.(v) So in the case of a will,(w) even when the marksman can write his name.(x) But by statute in Michigan the mark is only good when the party cannot write;(y) and so in Alabama.(z) A printed signature is good.(a) Any mode of writing or printing a signature is sufficient if adopted as such.(b) *Seemle*, that a printed name of the defendant is sufficient in a memorandum delivered by the plaintiff and accepted by an agent of the defendant.(c) A statute requiring that notice of certain objections should be "signed by the person objecting" is satisfied by a stamped signature affixed by the person himself.(d) A summons issued by an attorney with his name printed at the end is "subscribed" within the meaning

(s) *Chibester v. Cobb*, 14 L. T., N. S. 433.

(t) *Phillimore v. Barry*, 1 Campb. 513; see, however, *Sweet v. Lee*, 3 M. & G. 453; 4 Scott, N. R. 77 (*seemle* doubting the validity of a signature by initials).

(u) *McFarson's Appeal*, 11 Pa. St. 503; *Madison v. Zabriskie*, 11 La. 251; this applied where the signer held the top of the pen while another wrote the name; *Helshaw v. Langley*, 11 L. J. Ch. 17.

(v) *Palmer v. Stephens*, 1 Denio, 478 (citing cases); *Brown v. Butcher's Bank*, 6 Hill, 443; *Weston v. Myers*, 33 Ill. 432.

(w) *Addy v. Grix*, 8 Ves., Jr., 504; *Baker v. Dening*, 8 A. & Ell. 94.

(x) *Taylor v. Deming*, 3 N. & Per. 230.

(y) *Brown v. McCormick*, 28 Mich. 215.

(z) *Bickley v. Keenan*, 60 Ala. 295.

(a) *Commonwealth v. Ray*, 3 Gray, 447 (*dictum*); *Weston v. Myers*, 33 Ill. 432; *People v. Mortier*, 8 Pac. Co. L. J., 142; *Drury v. Young*, 58 Md. 547; *Saunders v. Jackson*, 3 Esp. 181; 2 B. & Pull. 239; *Schneider v. Norris*, 2 M. & Sel. 288; *Torret v. Cripps*, 27 W. R. 706; S. C., *sub nom.* *Tourret*, 48 L. J. Ch. 567.

(b) *Weston v. Myers*, 33 Ill. 432 (citing cases).

(c) *Lerned c. Wannemacher*, 9 Allen, 416.

(d) *Bennett v. Brumfitt*, L. R. 3 C. P. 30.

of the New York Statute requiring such subscription.(e) But a printed signature was held insufficient in another New York case.(f) In a Massachusetts case it was held that a vendor's bill of sale produced by the vendees, the defendants, with their names stamped thereon, does not, without further evidence as to the stamping, constitute a memorandum to bind them. The court thought that if the stamping of the defendant's name on the memorandum had been intended for a signature, the paper would have been left with the plaintiff, the purpose of the stamping, and the circumstances under which it was done, should be shown before the stamping can be regarded as a signature.(g)

§ 387. The next question for consideration is the necessity for the delivery and acceptance of the memorandum. Acceptance of the memorandum; deed. A writing under the Statute of Frauds, as at common law, must be accepted, and the evidence must prove this distinctly.(h) A mere offer, though in writing, will not bind even the party making it.(i) The acceptance must be manifested in some way; mere mental assent is not enough.(j) Where F., one of two parties, ordered goods by writing, exceeding \$50 in value, on January 21st, and on February 13th the firm was dissolved, and on February 15th part of the goods were shipped to F. and the rest later, it was held that Goodspeed, the other partner, was not liable, because the Wizard Plow Company, the plaintiff, did not accept the order in writing, and were therefore not liable, and the act done on the faith of the order was not till after the dissolution of the firm. F.'s order was not binding till accepted, and before acceptance it was revoked by notice of the dissolution of the firm.(k) As deeds often serve as memoranda under the Statute of Frauds, it will be well to note the effect of

(e) *Barnard v. Heydrick*, 49 Barb. 65; 2 Abb. Pr., N. S., 49; S. C., *sub nom.* *Brainerd*, 32 How. Pr. 98; see, also, *Mutual Ins. Co. v. Ross*, 10 Abb. Pr. 260 (note), discussing the word "subscription."

(f) *Viele v. Osgood*, 8 Barb. 132.

(g) *Boardman v. Spooner*, 13 Allen, 358.

(h) *Elwell v. Walker*, 52 Ia. 262.

(i) *Dominion Bank v. Knowlton*, 25 Grant, 131.

(j) *White v. Corlies*, 46 N. Y. 467.

(k) *Goodspeed v. Wizard Plow Co.*, 45 Mich. 323.

delivery in their case before taking up the general topic. A deed, to be valid as such, must, of course, be delivered, and this applies to points arising under the Statute.^(l) The question was suggested, but not decided, in a Massachusetts case, whether a deed undelivered could be a memorandum sufficient to satisfy the Statute of Frauds.^(m) A tender of an executed deed is no compliance with the Statute of Frauds.⁽ⁿ⁾ Where the defendants tendered a deed which the plaintiffs sent back to be properly acknowledged, and which the defendants retained, there was no sufficient memorandum.^(o) Where the tendered deed is refused because not conforming to the previous parol contract the Statute applies.^(p) The weight of authority is in favor of treating an undelivered deed as no compliance with the Statute of Frauds, in the absence of special circumstances showing that it was so intended by the parties.^(q) For there is no reason for requiring less in the case of a deed than in that of a simple contract, and a delivery and acceptance of the latter sufficient to show the recognition of it by at least the party to be charged is necessary, as will be seen hereafter; and it is believed that every example of a memorandum made and retained by the party to be charged, and yet decided to be binding, can be explained by facts which left no doubt as to the intent of the party to charge himself by the writing. Now, while it may happen that a deed which is not delivered so as to be valid as such may have passed between the parties as a memorandum, the burden of proof is upon the one who maintains this to establish it. Where the vendor is the plaintiff, a deed executed and tendered by him will, as a memorandum of the agreement, no more bind the defendant than would an unsealed contract so made.^(r) A con-

(l) *King v. Smith*, 33 Vt. 22; *Parker v. Parker*, 1 Gray, 409; *Johnson v. Brooks*, 31 Miss. 19; *Stephens v. Buffalo, etc.*, R. R., 20 Barb. 337. giving the want of mutuality as the reason for their decision).

(m) *Slack v. Black*, 109 Mass. 499.

(n) *Miller v. Pelletier*, 4 Edw. Ch. 104; *Adams v. Scales*, 1 Baxt. 339.

(o) *Steel v. Fife*, 48 Iowa, 100.

(p) *Sands v. Arthur*, 84 Pa. St. 481; 4 W. N. Cas., 501 (the court however

(q) *Miller v. Pelletier*, 4 Edw. Ch. 104.

(r) *Adams v. Scales*, 1 Baxt. 339; *Parker v. Parker*, 1 Gray, 409; *Comer v. Baldwin*, 16 Minn. 172; *Graham v. Theis*, 47 Ga. 483; *Lester v. Bartlett*, 2 Ind. 628; *Gwathney v. Cason*, 74 N. Car. 7; *King v. Smith*, 33 Vt. 22

veyance signed and sealed in the presence of witnesses, but not delivered, is not a sufficient memorandum under the Statute of Frauds; the grantor at the time declared that he retained it for further consideration.(s) A deed or memorandum retained by the party making it cannot charge the other party, as the former might offer it or conceal it as best suited his purpose.(t) Where the deed shows that it was not intended to be *inter partes*, or to be delivered, it is no evidence of a contract.(u) A memorandum signed by the lessor, but not by the lessee, and not delivered, was, in a Maryland case, considered, under the circumstances, as an inchoate instrument.(v) A deed of gift of land, sealed and signed by the donor, but not delivered, is not a good memorandum, though a deed afterwards delivered, which was void as against creditors, was drawn from the first one.(w) Where the deed was given by the vendor to the vendee for examination, and the vendee having approved it, there remained to perfect it only the signature of the vendor's wife; and the deed not having been so signed, there was no delivery to make the latter valid, and it was not good even as a memorandum.(x) Indeed, a deed executed only by the vendor does not evidence a contract for a deed from husband and wife.(y) So even where the deed signed only by the vendor, and without his wife's joinder, has been actually delivered.(z) That a deed has been acknowledged as well as signed, will not avail where there has been no delivery.(a) The defendant, a lessee, did not sign the lease, saying that it was unnecessary; but he put it upon record, and took and held possession thereunder, and his name occurring in the lease, which he wrote himself, the Statute of Frauds was held to be satisfied.(b) Where one Joseph Kershaw conveyed to

(holding that action will not lie for price of land where a deed tendered has not been accepted); see *Freeland v. Charnley*, 80 Ind. 134.

(s) *Brown v. Brown*, 33 N. J. Eq. 659.

(t) *Johnson v. Brooks*, 31 Miss. 19.

(u) *Allen v. Allen*, 45 Pa. St. 472.

(v) *Howard v. Carpenter*, 11 Md. 276.

(w) *Davis v. Lumpkin*, 57 Miss. 524.

(x) *Couer v. Baldwin*, 16 Minn. 172; see, however, *Gillatley v. White*, 18 Grant, 3.

(y) *Johnson v. Brooks*, 31 Miss. 19.

(z) *Parker v. Parker*, 1 Gray, 411.

(a) *Polhemus v. Hodson*, 4 C. E. Green, 64.

(b) *Traylor v. Cabanné*, 8 Mo. App. 133.

his son, John W. Kershaw, a tract of land, inserting in the deed therefor the following clause: "Said land is deeded as an advancement to said John W. Kershaw out of the estate of said Joseph Kershaw, and the deed is accepted by said John as his full and entire share of his father's estate." John W. Kershaw accepted this deed and placed it upon record, entered into possession of the property conveyed by it, and has ever since retained the same. The Supreme Court of Illinois said that "the acceptance of the deed by John W. Kershaw, and the enjoyment by him of the estate thereby conveyed, estops him from denying that the seal attached to the deed is his, as well as that of Joseph Kershaw. The seal being in presumption of law the seal of John W. Kershaw, as well as that of Joseph Kershaw, there is no ground for the contention of counsel for appellant that the case is affected by the Statute of Frauds."^(c) It would seem that assumpsit, or case, but not covenant, will lie on a lease signed by the lessor, but not by the lessee.^(d)

§ 388. A delivery of a deed in escrow is not sufficient to make it a valid memorandum.^(e) A deed delivered in escrow can be withdrawn before the condition is performed, and the Statute of Frauds is not satisfied.^(f) Where the plaintiff under a parol contract, invalid under the Statute of Frauds, received from the defendant a part payment of the purchase-money, and executed a deed which he delivered in escrow to be delivered absolutely upon full payment, it was held that in an action for the rest of the price the Statute was a bar.^(g) The effect of a delivery of a deed in escrow, as being or not a compliance with the Statute of Frauds, has been more fully discussed in a later case in Wisconsin, which held that the transfer of a deed by the vendor under a verbal contract to a third person, to be delivered upon the fulfilment of certain conditions to the vendee, does not bind the vendor, though the vendee seeking specific performance offers to perform the conditions, because a delivery in

Delivery of
deed in
escrow.

(c) *Kershaw v. Kershaw*, 102 Ill. 311.

(f) *Patterson v. Underwood*, 29 Ind.

(d) *Hinsdale v. Humphrey*, 15 Conn. 610.

431.

(g) *Cagger v. Lansing*, 43 N. Y. 550.

(e) *Thomas v. Sowards*, 25 Wis. 635.

escrow must be under a contract in writing to satisfy the Statute.^(h) The Supreme Court of Indiana, in the case just cited, said: "We cannot assent to the doctrine that a deed which has not been delivered is a sufficient writing to take a case out of the Statute of Frauds. Until delivery there is no valid contract for any purpose. Delivery is absolutely essential to the existence of a deed, for until delivery there is not a spark of vitality in the instrument; it is no more than a mere piece of paper covered with written or printed characters, and possesses no more force than a poem, or a historical essay, locked in the desk of the person described as grantor. It is unquestionably the law that a deed is destitute of force until delivered, and cannot be made available for any purposes."⁽ⁱ⁾ Where the

(h) *Campbell v. Thomas*, 42 Wis. 441, saying that where a deed is conditionally deposited it can be withdrawn at any time before the conditions are fulfilled, and that where the verbal contract called for a payment of the price through a mortgage, though the deed reserved the price in cash, if the mortgage had been deposited with the deed, the two might, perhaps, have been taken together to satisfy the Statute.

In *Freeland v. Charnley*, 80 Ind. 139, the court, following *Campbell v. Thomas*, said: We heartily assent to the doctrine that the conditions upon which a deed is placed in the hands of a depository, as an escrow, may be proved by parol.

In the present case the condition upon which the deed was placed in Gavin's hands might have been proved by parol, but the contract itself must be in writing. The deed, as we have seen, is, in legal contemplation, no contract at all, for delivery is an essential part of a deed, as Chief Justice Coke long since demonstrated.

It is clear to our mind that a deed placed in the hands of a depository, with directions to deliver it upon the

performance of a designated condition by the grantee, may be recalled before performance. Until the grantee has in some manner assented to such deposit, there cannot be the semblance of a delivery, for every delivery implies an acceptance. Of course, if there is, back of the deposit of the deed, an enforceable contract, relief might be had; but in such a case the deposit of the deed would not supply the right of action—that would be supplied by the executory contract. In the case at bar the deed was recalled before the performance of the condition, and there was no enforceable executory contract.

(i) *Freeland v. Charnley*, 80 Ind. 139, the court adding that it is true that Professor Washburn says of a deed not delivered, but placed in the hands of a third person, that 'it may be used as evidence of the contract to sell and purchase the land, and in that way have effect given to it, under the Statute of Frauds, as a writing signed by the parties;' 3 Washb. Real Prop., 303.

We look upon this statement as radically wrong. We find upon investigation that the only case cited in support of his text, by the author quoted, is

complainant agreed to convey land to the defendant, and the latter to transfer certain stock, etc., to him, and the complainant executed a deed for the land and deposited it in escrow with his attorney, and the defendant prepared, but did not execute his transfers, and made a written memorandum of the contract, which he deposited with the attorney just spoken of, the Statute of Frauds was regarded as satisfied. *(j)* Putting a deed into a solicitor's hands, in order that he may prepare a conveyance, does not comply with the Statute of Frauds. *(k)* Where, under a verbal bargain, a mortgage deposited in escrow is improperly delivered, it is not valid. *(l)* For examples of deeds good neither as such nor as memoranda under the statute, see note. *(m)*

§ 389. While the rule as to the necessity of a deed being delivered, if it is to serve as a memorandum under the Statute of Frauds, has thus peremptorily been laid down, there are several decisions which either fail to positively assert the doctrine or even deny it altogether. In Massachusetts it has been suggested that a deed never delivered is not a good memorandum, *(n)* and the question has been asked whether a deed executed and tendered upon certain conditions of payment was upon the fulfilment of these conditions a sufficient memorandum. *(o)* In a Pennsylvania case, where the ground laid for the specific enforcement of the contract was equitable part performance, the court said of a deed which had been executed by one of the parties: "Not having been delivered, it conferred no title, and having been retained exclusively in the vendor's hands, it could not serve

Undelivered deed how far a valid memorandum.

that of *Cagger v. Lansing*, 57 Barb. 421, and that this case has been directly overruled in *Cagger v. Lansing*, 43 N. Y. 550.

See *Tripp v. Bishop*, 56 Pa. St. 428, where both a deed was delivered in escrow and also a memorandum, and where the vendee was held to pay the purchase-money.

(j) *Bissell v. Farmers' Bank*, 5 McLean, 502.

(k) *Redding v. Wilkes*, 3 Bro. C. C. 401.

(l) *Powell v. Conant*, 33 Mich. 397.

(m) *Sanborn v. Sanborn*, 7 Gray, 142; *Underwood v. Campbell*, 14 N. H. 393.

(n) *Sanborn v. Chamberlin*, 101 Mass. 416; the sheriff sued the vendee, who bought at the sheriff's sale, and there was a memorandum, and the action was sustained, but *semble* the undelivered deed was of no effect.

(o) *Potter v. Jacobs*, 111 Mass. 36; see *Parker v. Parker*, 1 Gray, *supra*.

the purpose of averting the operation of the statute. But its execution was a fact bearing upon the question of the existence of the contract. It was a deliberate admission that the land had been sold and an explicit declaration of the terms of the sale of the quantity and boundaries of the land and of the amount of the purchase-money. Its production in evidence could have been enforced for the purpose to which it would extend; not to establish title, and not to avoid the Statute, but to show a carefully considered acknowledgment and recognition by Carroll of Hart's contract rights. Can it be doubted that verbal testimony of declarations by the plaintiff, made in December, 1867, of the precise facts related in the deed, would have been admissible in aid of the grounds on which the defence rested? And how, in view of such clear and definite evidence as would be thus afforded, would a chancellor find embarrassment in decreeing specific performance?"(p) An undelivered deed, it has been decided, may be a sufficient memorandum,(q) if handed over for such a purpose.(r)

(p) *Hart v. Carroll*, 85 Pa. St. 510; 5 W. N. Cas., 376.

(q) *Bowles v. Woodson*, 6 Gratt. 78; in *Jenkins v. Harrison*, 66 Ala. 356, the court said: "It is certainly true, as is insisted by the appellant's counsel, that delivery is essential to give effect to a deed; as essential as signing, or the attestation of witnesses, or a legal acknowledgment of execution. And it is true that, though signed, attested, or acknowledged, so long as the grantor retains control or dominion over it, so long as he does not part with it, with the purpose that it shall enure to the grantee, title will not pass from him. The concession does not meet the point upon which judgment is to be pronounced. We are not in search of a conveyance of the legal estate in the lands; we are not inquiring whether the grantor has parted with the title to them, and the grantee has become

invested with the title. The gravamen of the complaint, the necessity for a resort to a court of equity, consists in the fact that the grantor has not, as he was bound to do by the contract existing between him and the grantee, parted with the legal title; and it is performance of that contract which is claimed, and is the primary object of suit. It is written evidence of the contract, binding the vendor to performance for which we are inquiring, and that, according to the authorities, may be obtained from any document or instrument signed by the vendor; and it is not necessary that it should have been written, as were these deeds, with the view of furnishing evidence of the contract, and looking to its final consummation.

Wherever a note or memorandum of the substance of the contract—not a signification or expression, or detail of all

(r) *Thayer v. Luce*, 22 Ohio St. 74.

The most extreme case sustaining a deed as a memorandum, and which can scarcely, unlike the ones just cited, be reconciled to the weight of authority, is a chancery ruling in Canada, which held the deed to be a sufficient note in writing where the vendor signed and sealed a deed and took it away to have his wife sign it, and to have it registered, though neither of these two things was done.^(s) And it has been held in Virginia that the execution of a deed by the party to be charged is sufficient in a suit on a contract for the exchange of land.^(t) The precise part which the delivery of the deed plays when the deed is relied upon as the writing which shall satisfy the Statute becomes an important matter to determine under the law of Pennsylvania, where, as to land, the first three sections only of 29 Car. II. have been adopted. A writing executed by the party making or creating the estate is necessary to pass any interest greater than that of an estate at will; while, on the other hand, the purchaser is not within the Statute at all, which deals only with the transfer of the title, an equitable one passing by a simple contract executed by the vendor, a legal one by a deed sealed and delivered. The case of *Sands v. Arthur*, already cited, decided that where a vendor tendered a deed refused by the vendee, the latter was not compelled to take the property, and the court gave as a

its particulars, signed by the party to be charged, is produced, whatever may be its form or character, or whatever may be its operation or validity in courts of law—the words and purposes of the statute are satisfied. The party is shielded from the peril and mischief springing from the frailty and uncertainty of mere oral evidence, resting in the fleeting memory of witnesses; and the court has, over his own signature, clear and satisfactory evidence of the contract it is to enforce. *Atwood v. Cobb*, 16 Pick. 227.

Without passing beyond the facts of this case, we hold that a deed, drawn and executed with the knowledge of

both parties, with a view to the consummation of the contract of sale, which, in itself and of itself, embodies the substance, though not all the details or particulars, of the contract; naming the parties, expressing the consideration, and describing the lands though not delivered, and its delivery postponed until the happening of a future event, is a note or memorandum of the contract, sufficient to satisfy the words, the spirit, and purposes of the Statute of Frauds;” see *supra*.

(s) *Gillatley v. White*, 18 Grant, 3.

(t) *Parrill v. McKinley*, 9 Gratt. 6; in this case there were acts of part performance.

reason for their decision that there was no mutuality of remedy. The previous decision of the same court, in *Tripp v. Bishop*, had declared that this doctrine did not apply in cases under the Statute. Now *Tripp v. Bishop*, which was not referred to in *Sands v. Arthur*, differed from it in that in the former case there had been a memorandum delivered and accepted, and a deed delivered in escrow, while in *Sands v. Arthur*,^(u) the only memorandum was the tendered and rejected deed. It would reconcile this conflict of ruling to say that even under the Pennsylvania statute the deed or writing must be delivered and accepted in order to be the memorandum. Because, while a purchaser's contractual obligations under the Statute may be evidenced by parol, no such obligations accrue till the title legal or equitable in the land is vested in him. To vest the title he must join, at least verbally, in a valid transfer, and such transfer must be by a writing executed by the vendor. Being a party to a previous invalid oral agreement, will, it may be argued, have no such effect, and if, under the oral agreement, the vendor executes the memorandum, the previous promise of the vendee to buy can be revoked by him, and he can refuse to accept the memorandum. Verbally agreeing to take land is not a purchase of it even in equity; and a written promise to sell on the vendor's part is not effective as a contract, because the vendee makes no promise, and a deed tendered does not bind a vendee under no valid obligation to take, because no man can be made owner of land against his will by an act, *inter partes*, and this seems the better view, though the other side of the question is not incapable of defence, and it may be said that the oral sale is valid, and only not provable, and that after the vendor has bound himself by a writing signed, both parties being bound from the first, and the evidence required by the Statute of Frauds being in existence, the case at law is complete, though the vendor never delivered his memorandum. This question can only arise where the Statute, as in Pennsylvania, New York, etc. (see § 367), requires a memorandum

(u) 84 Pa. St. 481; *Tripp v. Bishop*, 56 id. 428.

signed, not by the party to be charged, but by the party making, transferring, or assigning the estate.(v)

§ 390. Leaving the subject of deeds as memoranda and passing to the consideration of delivery generally of the writing required by the Statute of Frauds, it may be said that the note executed by the party to be charged, or by the party making or creating the estate as the law may read, must be delivered to and accepted by the other party to the contract or transfer.(w) It has been doubted whether the memorandum evidencing a previous parol contract raising a trust need be delivered to be valid.(x) An undelivered memorandum has been allowed the force of corroborative evidence.(y) A memorandum made by the bookkeeper of the defendants, and placed in their safe, is a good memorandum, though never delivered, and not shown to have been known by the other party. The court said that a memorandum coming from the defendant's custody is as good a proof as if coming from the custody of the other side.(z) Where a lessor countermanded a written contract of lease executed by him before it was sent the lessee, there is no binding memorandum.(a) A memorandum as

Acceptance of the memorandum generally. To whom the memorandum is addressed.

(v) See *Reynolds v. Dunkirk R. R.*, 17 Barb. 615; see 18 Amer. Law Reg., 359, a note to *Sauser v. Steinmetz*. See § 367.

(w) *Stephens v. Buffalo R. R.*, 20 Barb. 337 (citing cases); *Snyder v. Neefus*, 53 Barb. 66; *Steel v. Fife*, 48 Iowa, 100 (citing *Grant v. Levan*); *McFarson's Appeal*, 11 Pa. St. 503; *Cook v. Anderson*, 20 Ind. 17; *Sutherland v. Parkins*, 75 Ill. 340; *Skelton v. Cole*, 1 De G. & J. 595; *Symons v. Want*, 2 Stark. 329; *Sanborn v. Sanborn*, 7 Gray, 142; *Raper v. Yocum*, 3 Mart. 444.

(x) *Urann v. Coates*, 109 Mass. 581; see *Ex parte Thomas*, *Re Thorp*, 11 Jur. N. S. 49, where the memorandum was not delivered, but where there was, however, delivery and acceptance of part of the goods sold.

(y) *Jelks v. Barrett*, 52 Miss. 322.

(z) *Drury v. Young*, 58 Md. 547, citing *Gibson v. Holland*, *Johnson v. Dodgson*, and saying that the memorandum need not be delivered.

(a) *Phillips v. Edwards*, 33 Beav. 441. A letter from the vendors to their agent was not delivered to the defendants who were informed of it; and there was a tender of a deed by the defendants which the plaintiff sent back to be properly acknowledged, and which was retained by the defendants; this does not satisfy the Statute of Frauds, because, apparently, the deed was not sent to the plaintiff as being delivered even as a memorandum; *Steel v. Fife*, 48 Ia. 100 (citing *Grant v. Levan*).

follows: "These lands sold to Robert Morris, of Philadelphia, deeds poll to him, purchase-money paid me," signed A. "The overmeasure to be cast up and accounted for," endorsed on a survey though sufficiently full, would not take the case out of the Statute of Frauds, inasmuch as the paper was found in the possession of the vendor's representative, and there was no evidence that it had been ever delivered, or that the other party knew anything of it. (b) A memorandum delivered without authority does not bind. (c) An acceptance not made to, or requested to be forwarded to, the defendant is insufficient. (d) Where the signature relied on is a printed name at the top of the memorandum, the latter must have been delivered and accepted as a binding note in writing. (e) There is a class of cases which, while they affirm the necessity of the obligor's delivery of the memorandum, throw doubt upon the acceptance of its being an essential feature; and it has been held that a letter addressed by the defendant to his own agent is a sufficient note. (f) In a late Massachusetts case it was held that the memorandum is sufficient if it be only a letter written by the party to his own agent; or an entry or record in his own books; or even if it contain an express repudiation of the contract; and this because it is evidence of, but does not go to make the contract. (g) A case still more recent in the Ontario Court of Appeals is to the same effect: *One K.*, the

(b) *Grant v. Levan*, 4 Pa. St. 424. This decision met with some criticism from the Pennsylvania bar at the time it was rendered. As a matter of fact, the claimants, under the Morris title, afterwards obtained the original deeds made under the above contract to Robert Morris, which were discovered in the possession of one of his descendants.

(c) *McIntire v. Bowden*, 61 Me. 158.

(d) *Dickinson v. Rawson*, 12 N. Y. Week. Dig. (S. C. N. Y.) 356.

(e) *Hawkins v. Chace*, 19 Pick. 502; *Lerned v. Wannemacher*, 9 Allen, 416. For other examples of undelivered or unaccepted memoranda, see *Newport v.*

Spivey, 7 L. T., N. S., Rep. 328; *Corbitt v. Salem Co.*, 6 Or. 405; *Allen v. Allen*, 45 Pa. St. 472.

(f) *Gibson v. Holland*, L. R. 1 C. P. 5; 35 L. J. C. P., 5; see, also, *Longfellow v. Williams*, Peake's Add. Cas. 225; *Moore v. Mountcastle*, 61 Mo. 426; *Moss v. Atkinson*, 44 Cal. 16; *Peabody v. Speyers*, 56 N. Y. 233.

(g) *Townsend v. Hargraves*, 118 Mass. 332, citing *Gibson v. Holland*, L. R. 1 C. P. 1; *Buxton v. Rust*, L. R. 7 Ex. 279; *Allen v. Bennet*, 3 Taunt. 169; *Tufts v. Plymouth Gold Mining Co.*, 14 Allen, 407; *Argus Co. v. Albany*, 55 N. Y. 495.

agent of the defendants, the vendors, entered the plaintiffs' order in his book, and reported the sale by letter to the defendants, who wrote the plaintiffs stating these, and giving but a qualified approval to the sale. The court said that the letter of K. to the defendants was a sufficient memorandum to satisfy the seventeenth section of the Statute of Frauds, which requires it for evidence only, and that it made no difference that it had passed between the defendants' agent and themselves; and, at any rate, the letter of the defendants to the plaintiffs was a sufficient memorandum of their agent's sale, and its effect was not impaired by the partial disapproval expressed in it.(h) A memorandum written by one of the defendants, and signed by the plaintiff, the purchaser, and a letter written by one defendant to another defendant, stating that the former had sold the land to the plaintiff, satisfy the Statute of Frauds.(i) Letters addressed to a third party are sufficient.(j) An advertisement by the defendants that they would be responsible for the payment of certain bank notes makes them liable to any one taking the notes on the faith of the representation.(k) A reservation in favor of the plaintiff made in a deed of the property to a third person will generally bind.(l) In an early New York case a distinction in proving a trust was made between letters addressed to the *cestui que trust* and those addressed to a third person.(m)

§ 391. The acceptance of the memorandum under the Statute of Frauds may be verbal. In *Warner v. Willington Kindersley*, V. C., so stated the law, and expressed himself as surprised to be unable to find any authority on the point.(n) The American law was

Further consideration as to acceptance of memorandum.

(h) *Ockley v. Masson*, 1 Can. Law Times, 203; 8 Ont. App. 108. 337; see *supra*; but see *Wright v. Cobb*, 5 Sneed, 144, and *Allen v. Allen*, 45 Pa. St. 472.

(i) *Campbell v. Dennistown*, 23 U. C. C. P. 343. (m) *Steere v. Steere*, 5 John. Ch. 12.

(j) *Moore v. Hart*, 1 Vern. 114; *Ogden v. Ogden*, 1 Bland, 287; *Moss v. Atkinson*, 44 Cal. 16; *Moore v. Mountcastle*, 61 Mo. 426; see 9 Amer. L. Rev. 435. (n) 3 Drew., 529; 25 L. J. Ch., 663; 2 Jur., N. S. 433; so in *Benecke v. Chadwicke*, 4 W. R. 688; and *Smith v. Neale*, 2 C. B. 66; 26 L. J. C. P., 143. *Liverpool Borough Bank v. Eccles*, 4

(k) *Tarbell v. Stevens*, 7 Iowa, 166. H. & N. 143; and *Buxton v. Rust*, L.

(l) *Macon v. Sheppard*, 2 Humphr. R. 7 Ex. 280, follow *Warner v. Wil-*

settled in the same way at a comparatively early period. In a Massachusetts case the court said: It is not denied by the defendant that a verbal acceptance of a written order to sell merchandise is sufficient to constitute a complete and obligatory agreement, on which to charge the person by whom it is signed. In such case, if the memorandum is otherwise sufficient, when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid, and capable of enforcement, is supplied by the signature of the party sought to be charged to the offer to sell.^(o) A verbal acceptance binds the obligee as if he had signed.^(p) Acquiescing in an act of assembly, which interfered with the enjoyment by an owner of his real estate, might be shown by parol.^(q) And a verbal acceptance of a writing has been held to bind in New York, though the party accepting was the vendor, who under the Statute was the person to make the memorandum; *sed quære*.^(r) Where the plaintiff took the defendant's memorandum and put it

lington. In *Reuss v. Picksley*, L. R. 1 Exch. 344, 35 L. J. Exch., 218 (the fuller report), the above cases, together with *Coleman v. Upcot*, and *Laythoarp v. Bryant*, were cited; Sir Wm. Grant's *dictum*, in *Martin v. Mitchell*, denied; and *Mozley v. Tinkler* distinguished as a case where the agreement called for a written acceptance, and where, *semble*, the rule above contended for was admitted; Willes, J., said *Warner v. Willington* was only a rediscovery of the contemporaneous exposition of the Statute; see *Watts v. Ainsworth*, 1 H. & C. 86; 6 L. T., N. S. 254; *Jolliffe v. Blumberg*, 18 W. R. 784; *Gilpin v. Scovil*, 1 Hann. (N. B.) 379, citing cases. On the general point that a writing may be accepted orally, see *Leake's Dig. of Law of Contr.*, pp. 184, 194; *Water. Spec. Perf.*, § 132 *et seq.*; *Brogden v. Metrop. R. W.*, L. R. 2 App. Cas. 687; 4 Chitt. Stat., 3d ed., 481, note, col. 1.

(o) *Sanborn v. Flagler*, 9 Allen, 475.

(p) *Patchin v. Swift*, 21 Vt. 298; *Johnson v. Dodge*, 17 Ill. 441; *Wise v. Ray*, 3 Ia. 431; *Simonson v. Kissick*, 4 Daly, 146; *Grove v. Hodges*, 55 Pa. St. 515; *Lowry v. Mehaffy*, 10 Watts, 389; *Smith's Appeal*, 69 Pa. St. 474; *Thayer v. Luce*, 22 Ohio St. 74; *Waul v. Kirkman*, 27 Miss. 826; *Curtis v. Blair*, 26 Miss. 324; *Kinloch v. Savage*, 1 Speer's Ch. 471; *Linton v. Williams*, 25 Ga. 391; *Adle v. Metoyer*, 1 La. Ann. 259; *Madison v. Zabriskie*, 11 La. 251; *Amory v. Black*, 13 La. 267.

(q) *Cottrill v. Meyrick*, 3 Fairf. 232; see, for example of parol acceptance, in a case not affected by the Statute of Frauds, *Beardsley v. Davis*, 52 Barb. 163; *Dutch v. Mead*, 36 N. Y. Super. 431.

(r) *Mason v. Decker*, 72 N. Y. 598 (the subject-matter of the contract was personalty).

into his pocket, the court directed the jury to ascertain whether this was intended for a delivery, and whether the agreement between the parties called for the plaintiff's signature.(s) A written direction addressed by the defendant vendor to his agent, directing him to "make papers," handed to the plaintiff to take to the agent is sufficiently delivered.(t) A memorandum and a copy thereof mutually interchanged between the parties make a sufficient delivery.(u) The manual delivery of a title-bond is sufficient under the Statute of Frauds.(v) As to verbal acceptance of an order or bill of exchange see "Guaranty." It has been said that the verbal acceptance of the memorandum must be unconditional.(w) Where a proposal is made by the plaintiff, and modified and altered by B., who signs the modified agreement, and the plaintiff verbally accepts the agreement thus changed, the Statute of Frauds is satisfied in a proceeding against B.(x) An implied acceptance is sufficient.(y) Acting upon the written offer is enough.(z) In a Scotch case, where a tenant signed and sent to his landlord a lease at an increased rent for the landlord's signature, and the new rent was paid, and the landlord retained the rent for a year, there is sufficient acceptance and part performance.(a) A draft of a contract signed by one party, and accepted in a letter signed by the other, the latter making a certain exception, and the former then proceeding to carry out the contract, satisfies the Statute of Frauds.(b) So that even a modified acceptance, if carried into effect, will bind on the ground of part performance, especially in the case

(s) *Justice v. Lang*, 42 N. Y. 511.(t) *Spangler v. Danforth*, 65 Ill. 153.(u) *Rhoades v. Castner*, 12 Allen, 130.(v) *Wilburn v. Spofford*, 4 Sneed, 699.(w) *Farwell v. Lowther*, 18 Ill. 255; *Seward v. Ferris*, 21 Law Reporter, 699 (S. C. Vt.); *Donnison v. People's Café Co.*, 45 L. T., N. S., 189.(x) *Cahill v. Martin*, L. R. 5 Irel. 240.(y) *Crook v. Cowan*, 64 N. Car. 746;*New York, etc., R. R. v. Pixley*, 19 Barb. 428; see *Addis. on Contr.* (3d Am. ed.), 119, n. 2.(z) *Dowell v. Dew*, 12 L. J. Ch. 164; 7 Jur., 117, affirming 1 Y. & Coll. 345; *Argus Co. v. Mayor, etc., of Albany*, 55 N. Y. 500; *Perkins v. Hadsell*, 50 Ill. 220.(a) *Ballantine v. Stevenson*, Sess. Cas., 4th series, vol. 8, p. 959.(b) *Western Union Tel. Co. v. Chicago, etc., R. R. Co.*, 86 Ill. 252.

of a marriage made under a contract in consideration thereof.(c) Supplying the defendant with an article under his written order is a sufficient acceptance of the latter.(d) Acts to be acceptance must be referable to the contract.(e) Oral proof of refusal or disclaimer of a deed or memorandum under the Statute of Frauds is admissible.(f) The fact that there has been no delivery may be shown by parol.(g) Acceptance may be shown by action brought.(h) It is at least *prima facie* proof.(i) Besides the two cases passed upon in *Russ v. Picksley*,(j) there are two or three authorities which seem to require a written acceptance. One was an agreement to pay a portion of a debt in consideration of the debtor's discharge,(k) and this Lord Ellenborough thought should have been accepted in writing. In another case(l) a distinction was made between a proposal and an express undertaking; in the former a written acceptance being required; in the latter not. A written offer to sell land accepted by parol was held insufficient in a Minnesota case.(m) So in Massachusetts a written offer to sell goods.(n) Where a verbal offer was accepted in writing by the vendees, and before a deed is tendered they modify their acceptance, the Statute of Frauds was held not to be satis-

(c) *Saunders v. Cramer*, 5 Ir. Eq. 12; S. C., *sub nom.* *Green v. Cramer*, 2 Conn. & Law; 2 Dr. & War., 87, and see "Marriage." For examples *contra* see the same chapter, and see *Kirwan v. Burchell*, 10 Ir. Ch. 63.

(d) *Manning v. Mills*, 12 U. C. Q. B. 578.

(e) *White v. Corlies*, 46 N. Y. 467.

(f) *Bingham v. Clanmorris*, 2 Moll. 253; *Burritt v. Silliman*, 13 N. Y. 97; *Corbett v. Norcross*, 35 N. H. 110; *Copeland v. Weld*, 8 Me. 411; *Murray v. Pate*, 6 Dana, 336.

(g) *Stephens v. Buffalo, etc.*, R. R., 20 Barb. 337.

(h) *Coleman v. Upcot*, 5 Vin. Abr. p. 528, pl. 17; *Connolly v. Autenrieth*, 4 La. Ann. 163.

(i) *Boys v. Ayerst*, 6 Madd. 324.

(j) L. R. 1 Exch., 344; 35 L. J. Exch., 218, passing on *Martin v. Mitchell* and *Mozley v. Tinkler*; see *Beatson v. Nicholson*, 6 Jur. 620, where the written agreement called for a written acceptance; the plaintiff was however entitled to waive this.

(k) *Gaunt v. Hill*, 1 Stark. 10.

(l) *Palmer v. Scott*, 1 R. & Mylne, 394.

(m) *Lanz v. McLaughlin*, 14 Minn. 72 (citing cases).

(n) *Smith v. Gowdy*, 8 Allen, 566; see, *supra*, cases under the New York Statute requiring both parties to sign; see *Washington Ice Co. v. Webster*, 62 Me. 355, saying that a telegram referring to a verbal offer does not bind any more than a verbal acceptance of a written offer, citing *Smith v. Gowdy*.

fed.(o) In Missouri it has been decided that the acceptance of a writing must be in writing.(p) Under 19 and 20 Vict., c. 6, § 11, and 41 Vict., c. 13, § 1, a drawee of a bill sufficiently accepts it by writing his name thereon, but a stranger, who wishes to accept, must add words of acceptance.(q) In Scotland a written order for goods verbally accepted and acted on will not come within the exception of the Statute, A. D. 1579, c. 83.(r)

(o) *Gummer v. Trustees of Omro*, 45 Wis. 386; see *Phillips v. Edwards*, 33 Beav. 441.

(q) *Walker v. McKinley*, Court of Sess. Cas., 6 R. 1132.

(p) *Rousch v. Duff*, 35 Mo. 314.

(r) *Chalmers v. Walker*, Sess. Cases, 4th series, vol. 6, p. 201.

CHAPTER XVII.

THE CONTENTS OF THE MEMORANDUM: THE CONTRACT IN GENERAL: TERMS AND CONDITIONS: DESCRIPTION OF THE PARTIES.

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| <p>§ 392. Contents of the memorandum—a contract must be shown.</p> <p>§ 393. The memorandum must have been designed to evidence the contract.</p> <p>§ 394. Memorandum denying liability.</p> <p>§ 395. The memorandum must show a concluded contract. Examples of concluded contracts.</p> <p>§ 396. Examples of contracts not concluded.</p> <p>§ 397. The rule when a more formal subsequent writing is contemplated.</p> <p>§ 398. The memorandum must show the whole contract.</p> <p>§ 399. Memorandum must show the terms and conditions.</p> <p>§ 400. The price, cash and credit.</p> | <p>§ 401. The parties. Examples of sufficient memoranda.</p> <p>§ 402. Parties shown by connecting several memoranda.</p> <p>§ 403. General points as to statement of the parties in the memorandum; memoranda by agent, etc.; public sales.</p> <p>§ 404. Open guaranties.</p> <p>§ 405. Examples of insufficient memoranda; not showing the parties, generally.</p> <p>§ 406. Other examples of insufficient memoranda; broker's memoranda, etc.; description of the parties.</p> <p>§ 407. The parties described by a designation, as vendors.</p> |
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§ 392. THE form of the memorandum having been determined, the next subject for consideration is its contents, and before taking the several parts of the contract which the writing must show, the general nature of the contents of the latter is a point which calls for some observations. First, the memorandum must show an agreement, that is to say, a concluded contract; secondly, it must be intended as evidence of such contract; and, thirdly, it must show the whole contract. A contract, then, must be shown by the writing,^(a) in which the minds of the parties

Contents of the memorandum—a contract must be shown.

(a) *Skelton v. Cole*, 1 De G. & J. 595; *Waterman v. Meigs*, 4 Cushing, 498; *Minturn v. Baylis*, 33 Cal. 133; *Wright v. Lancaster*, 48 Tex. 255; *Williams v. Morris*, 95 U. S. C. 456; *Newberry v. Wall*, 65 N. Y. 488; *Hop-pock v. Wilson*, 1 Southard, 149; *Bal-lard v. Ward*, 89 Pa. St. 362; *Temple v. Johnson*, 71 Ill. 16; *Reid v. Ken-worthy*, 25 Kan. 703.

have met.(b) The memorandum must be so reasonably certain and definite in itself that the contract can be made out without requiring additional proof in parol.(c) "It must contain such words as will enable the court, without danger of mistake, to declare the meaning of the parties; it must obviate the necessity of going to oral testimony and, relying on treacherous memory, as to what the contract itself was."(d) And when specific performance is sought, the terms of the contract must appear with enough certainty to enable the chancellor to make a definite decree.(e) Under a law allowing the consideration of a contract to be proved by parol, the fact that two promises are each the consideration for the other will not make oral evidence of either promise admissible.(f) There is authority for the proposition that a writing recognizing a duty to do a precise act, as to convey land, satisfies the Statute, though the instrument does not recite the contract which created the obligation. A bond which read that it should be void if the obligor conveyed the obligee certain land was valid, though it recited no contract, and did not even directly promise that a deed should be given.(g) In an Alabama decision to the same effect, the court holding an absolute covenant to convey land good, although it did not state the price, said: "It is a mistake to consider this covenant a contract for the sale of the land. It is an unconditional promise to convey the land to Brown at a time stipulated, and it does not require any act to be done by Brown, as a condition upon which the conveyance is to be made, it includes by necessary implication, at least *primâ facie*, an admission that the consideration, whatever it was, which was the inducement to the promise, had been paid or performed by Brown. It is

(b) Patton v. Rucker, 29 Tex. 407; as to whose understanding it is, whether that of the promissor or that of the promisee, which is to prevail in the interpretation of the contract, see Parsons, Ess. Leg. Top. 68 (Law Mag. and Rev. vol. xxxii. 3d ser. 98).

(c) Johnson v. Granger, 51 Tex. 43; Tice v. Freeman, 30 Minn. 389; Crockett v. Green, 3 Del. Ch. 467.

(d) Scarritt v. St. John's M. E. Church, 7 Mo. App. 178.

(e) Neufville v. Stuart, 1 Hill, Ch. 166; Eargood's Estate, 1 Pears. 400.

(f) Whipple v. Parker, 29 Mich. 371, *semble*.

(g) Plunkett v. Methodist Episcopal Society, 3 Cushing, 566; see § 409, § 323.

an admission that a sale has been made, and not a contract, professing to recite the terms of a sale, and is not therefore within either the letter or spirit and design of the Statute of Frauds, the design of which being to prevent parol proof of the sale of land, requires all the constituents of the contract to be in writing, and signed by the party against whom it is attempted to be enforced. But why require the terms of a contract to be stated which the party admits in writing, under his seal, he is bound to consummate by the execution of a deed? The object of the Statute is to prevent fraud and perjury, but here there is no danger of either, as the party to be charged has, by his obligation, defined the precise extent of his liability, and has not made it dependent on any act to be performed by the other party.”(h)

These two were cases of covenant, and where the defendant, who had bought land from a third party, wrote to the latter's agent to convey a certain lot directly to the plaintiff, it was held in Kentucky that the letter was not a sufficient memorandum because it stated no price and contained no promise by the defendant to convey. The last differs from the two others in the important respect that it contains no promise.(i) In an Illinois case, it was said that “in Virginia it has been decided that a letter containing a promise to make a deed of a tract of land, according to contract, is a sufficient memorandum under the Statute of Frauds, notwithstanding the terms of the contract are not mentioned, provided the party claiming the conveyance can prove by the testimony of one witness the price which was agreed to be paid for the land: *Johnson v. Ronald's Adm.*, 4 Mumf. 77. The doctrine of this case seems to be contrary to the general rule of the English courts, they having required, unless under certain exceptional circumstances, that the reference be to some document in writing, though it has not been deemed indispensable that such writing be signed.”(j) For the effect generally of omitting to state the price in the memorandum, see § 400.

(h) *Holman v. Bank of Norfolk*, 12 Ala. 369; see § 409, § 323. this though the plaintiff made a part payment and took possession).

(i) *Kay v. Curd*, 6 B. Mon. 102 (and (j) *Kingsbury v. Burnside* 58 Ill.

Where the memorandum does not give the terms of the contract, it is insufficient.^(k) "This is to certify that I have received from, etc., the sum of, etc., and have applied it to the sale of Lot No. 9, etc., and as soon as I get a bond, I will give him one for the lot, etc.," is an insufficient statement, not giving the terms or conditions of the contract nor the price.^(l) Where a memorandum read: "Received from Caddick 250*l.*, his share of dividend in mine instalment due to Messrs. Bannister for the Tivdale mine." The court said: "Now, although the last receipt may show, and I think does show, that there were certain terms, one part of which was that the plaintiff was to pay a portion of the rent, or perhaps even show that he was to pay half of the rent; yet it does not show what the other terms were according to which the alleged partners were to be mutually interested in the result of this payment and they are distinctly at issue upon that subject."^(m) The word "arrange" fairly imports a contract to pay.⁽ⁿ⁾ The words "will deliver," used in a written offer at a certain price in speaking of goods, mean "sell to," and create a contract.^(o) A written offer of sale which requires

335 (citing *Clinan v. Cooke*, *Hodges v. Horsfall*, *Saunderson v. Jackson*, *Parkhurst v. Van Cortlandt*).

(*k*) *Oakman v. Rogers*, 120 Mass. 214.

(*l*) *Irving v. Merrygold*, 3 U. C. Q. B. 273.

(*m*) *Caddick v. Skidmore*, 2 De G. & J. 54; 27 L. J. Ch. 155. Where two doctors bargained for the sale of a practice, and of the lease of the vendor's house, and the correspondence did not show that the length of time during which the seller was to introduce the buyer to the patients was fixed, the seller merely saying that it would be his aim and duty to give such introduction, and the buyer insisting on a specific agreement, and that no agreement as to the repairs of the house was come to, and a formal contract was contemplated, the Statute of Frauds was

not complied with; *May v. Thomson*, 20 Ch. D. 716; *Bacon v. C.*, 711.

(*n*) *Abel v. Wilder*, 9 Lea, 453.

(*o*) *Sanborn v. Flagler*, 9 Allen, 475. A memorandum as follows was held insufficient: "The understanding with Mr. Drake is as follows: \$2000 for the first year, etc., and, provided the increase sales shall warrant it, he is to have \$3000, 3 year in proportions to the above;" *Drake v. Seaman*, 27 Hun, 63, citing cases, and distinguishing *Hagan v. Domestic Sew. Mach. Co.* The following letter was also held to show no contract: The maple lumber which I agreed to get out for you is ready for delivery. Would like to have you call up and take the account of it, as I wish to draw it over to the railroad track; *Brown v. Whipple*, 58 N. H. 229; see *Ayres v. Gallup*, 44 Mich. 13.

the other party only to make a simple acceptance, is evidence of a unilateral contract, and when accepted even by word of mouth satisfies the Statute of Frauds.(p)

Where the owner of land wrote, "I will give John Simpson one hundred acres of land, etc., or I will give him two hundred acres," etc., and the donee partly performed the agreement, the memorandum was held sufficient.(q) A memorandum drawn by a broker, agent for both parties, and reading as follows: "Sold for Butler, etc., to, etc., Thomson," etc., was held to show a mutual obligation to buy as well as to sell.(r) So a memorandum, "I have purchased of," etc., signed both by the plaintiff, the seller, and by the defendant, the buyer, infers an agreement by the former to sell, as well as one by the latter to buy.(s) A memorandum as follows: "I hereby agree to sell John Kelly" (the defendant) "the house, etc., for the sum of, etc., . . . and hereby acknowledge the receipt of ten dollars on account of above sale," signed by Thornton, the plaintiff, and Kelly, the defendant, is sufficient.(t) A memorandum beginning, "I do sell," and providing that the seller will authorize a formal sale, is sufficient.(u) Where the plaintiff, the buyer, wrote, "I hereby agree to purchase," etc., and the plaintiff gave a receipt, "Received of, etc., the sum of, etc., as a deposit on the purchase of, etc.," it was held that the word "purchase" meant agreement to purchase, and the contract sufficiently appeared.(v) Where in order that a guaranty made to a firm should continue in force, it was necessary after changes in the firm that the intention that the guaranty should continue must, under a statute, be evidenced by writing; and a particular guaranty was defective in this respect; a letter from the

(p) *Sanborn v. Flagler*, 9 Allen, 475 (a sale of goods); *Mirzell v. Burnett*, 4 Jones's Law Rep. 249 (a sale of land); *Simonson v. Kissick*, 4 Daly, 146 (sale of goods); see, *contra*, *Corbitt v. Salem Gas Co.*, 6 Or. 405.

(q) *Simpson v. Breckenridge*, 32 Pa. St. 290 (the Penna. Statute only requires a writing to pass the title to be executed by the party making or creating the estate).

(r) *Butler v. Thomson*, 92 U. S. 412, reversing the Circuit Court, 11 Blatch. C. C. 535.

(s) *Joseph v. Holt*, 37 Cal. 250.

(t) *Thornton v. Kelly*, 11 R. I. 499; see *Richards v. Edicks*, 17 Barb. 263 (a case outside of the Statute of Frauds).

(u) *Crocker v. Neily*, 3 Martin, N. S. 583.

(v) *Long v. Millar*, 48 L. J. Q. B. 596; 27 W. R. 720 (Lords Justices).

guarantor showing that he supposed the guaranty to be still in force does not comply with the Statute.(w) For examples of memoranda regarded as indicating a promise, see the cases in the note, and those therein cited.(x) A writing evidencing a contract between one set of persons as vendors and vendees cannot be used to establish an agreement between others, as, for example, one between the joint owners, the vendors.(y) A receipt for a certain sum of money given in part payment of a certain tract, etc., the payment to be made in a certain way, was held an insufficient memorandum for one, among other reasons, that it did not show that there was any contract between the persons named in the receipt as having respectively made and received the payment.(z) A memorandum as follows: "Received of, etc., \$300, etc., on payment on house, etc.," is insufficient, for among other reasons the absence of any promise stated.(a) A memorandum was as follows: "We hereby acknowledge that Lawrence J. Riley has been this day declared the highest bidder and purchaser of house 23 for the sum of . . . and that he has paid into our hands the sum of . . . as a deposit and in part payment of the purchase-money; and we hereby agree that the vendor shall in all respects fulfil the conditions of sale. Vendor's name George B. Farnsworth, mortgagee; G. F. Hunting & Leavitts, auctioneers." And the court said, speaking of the above writing: "But it omits to state what the conditions of sale were, so that there is no allegation that the defendant agreed to do anything."(b) Signing one's name in shipping articles, in a column headed "Sureties," makes an insufficient memorandum under the Statute of Frauds, because it does not show the obligation assumed.(c) A statute which requires, in order to bind homestead property, that there shall be a written stipulation making the latter liable for the debt, is not complied with by

(w) *Backhouse v. Hall*, 6 B. & S. 115.

(x) *Salmon Falls Co. v. Goddard*, 14 How. U. S. S. C. 454; *Warner v. Wilmington*, 3 Drew. 529, etc.; *Powell v. Dillon*, 2 B. & Beat. 420; *Coddington v. Goddard*, 16 Gray, 436.

(y) *Gill v. Bicknell*, 2 Cushing, 358.

(z) *Sheid v. Stamps*, 2 Sneed, 175.

(a) *Patterson v. Underwood*, 29 Ind. 610.

(b) *Riley v. Farnsworth*, 111 Mass. 153.

(c) *Dodge v. Lean*, 13 Johns. 509.

confession of judgment allowing the execution to go against all the debtor's property, expressly including the homestead.(d) A memorandum evidencing another contract, and made before that sued upon, is obviously no evidence of the latter.(e) Where the writing shows expressly that the defendant refuses to bind himself, the want of a promise is yet more plainly fatal. As a conveyance to a third person, subject to the plaintiff's right if any, but no right being admitted.(f) An endorsement on an order, "Received this order," binds the endorser to nothing.(g) Where, under a contract relating to land, the party charging signed the memorandum and paying an earnest said he would sign the next day, but refused to do so, and his solicitor wrote asking for a return of the money, the latter's letter is no signature of the first memorandum.(h)

§ 393. Where the memorandum is not intended as evidence of the contract, it will not, as a general rule, be so taken. In an old English case it was said that a particular (*semble*) description of property prepared for the proposed buyer does not bind, though shown the purchaser, if it was not proved to have been shown him on his purchase, or that he bought by it, and the Statute of Frauds applies.(i) Where the agent of a landlord sent a circular to his tenants announcing his intention to grant new terms at an increased rent, and inclosing a draft agreement, which the tenants signed, the Statute of Frauds was not satisfied, as the circular was not a contract, but a mere statement of intention, and as the landlord, the defendant, did not sign the agreement.(j) So an advertisement by the vendor of a sale upon certain terms of payment

The memorandum must have been designed to evidence the contract.

(d) Rutt v. Howell, 50 Ia. 537.

(e) Peabody v. Harvey, 4 Conn. 122.

(f) Craig v. Lewis, 110 Mass. 379; see, on this point generally, Roberts v. Tucker, 3 Exch. 632; Hall v. Soule, 11 Mich. 494; Hill v. Atwater, 24 La. Ann. 325.

(g) Knox v. Haralson, 2 Tenn. Ch. 236.

(h) Wood v. Midgeley, 2 Sm. & G.

115.

(i) Cass v. Waterhouse, Prec. Ch. 29; the memorandum must be signed with intent to enter into it; McConnell v. Brillhart, 17 Ill. 360; Sanborn v. Sanborn, 7 Gray, 142.

(j) Archbold v. Lord Howth, 1 Ir. Rep. C. L. 619; 18 Ir. Jur., 88.

is not sufficient.^(k) Where the directors of a company signed the articles of association, one of which was that "Mr. William Eley," etc. (the plaintiff), "shall be the solicitor of the company" (the defendant), etc., it was held that the signature was *alio intuitu*, and before any agreement was come to with the plaintiff, and therefore the articles of association so signed were not a sufficient memorandum under the Statute of Frauds.^(l) Information given by a solicitor for another purpose than that of evidencing the contract, and in a letter complaining of the delay of the other side, was not received by Jessel, M. R., to identify the vendor, though the other memoranda were sufficient on all points but this, and though the letter in question did name the vendor.^(m) An inventory made by a third person, at the request of the parties, beginning, "Invoice of articles purchased by Pipkin, etc. (the plaintiff), of, etc., James" (the defendant), is not sufficient, not being intended as a memorandum.⁽ⁿ⁾ The following memorandum was held to show no contract: "Terre Haute, Ind. —, 187 , A. P. Lee & Bro." (under this caption there is a given list of the number of boxes of the different kinds of lemons and oranges, the price per box of each kind, and the aggregate price of each kind), and closing as follows:—

"Freight. Ship Emp. Line, 60 days' acceptance.

"(Signed) Hills Bros.

"per E. F. Lock.

"April 21, 1875.^(o)

An invoice in some cases has been held insufficient, because not intended to be the memorandum.^(p) "It is evident," said the court, in a case in Anstruther, "that the particular was at first made out and delivered, not as evidence of any agreement,

(k) Kurtz v. Cummings, 24 Pa. St. 62; see Peabody v. Harvey, 4 Conn. 37. A written advertisement or notice of his sale, signed by a trustee, is not sufficient under the Statute of Frauds, because it is intended to show not a sale but a purpose to sell; White v. Watkins, 23 Mo. 426.

(l) Eley v. Positive Assurance Co., L. R. 1 Exch. D. 28; 45 L. J. Exch., 122.

(m) Donnison v. People's Café Co., 45 L. T., N. S., 180; see, as to this case, 69 Law Times, 224; 16 Ir. L. T. 41.

(n) Pipkin v. James, 1 Humphr. 326.

(o) Lee v. Hills, 66 Ind. 478, citing cases.

(p) See Richards v. Porter, 6 B. & C. 437, and see *supra*.

for no agreement had then been made, but merely as a list or catalogue of the matters for sale to enable the purchaser to form a proper estimate of their value; as this was the original nature of the particular, nothing which has happened since could possibly alter it; it was delivered into Clark's hands for the same purpose, as an enumeration of the things under a sale, to serve as an instruction to him in making out the description of them in the conveyance; the signing this particular could have no other effect than to give it authenticity as a true list of the items then offered for sale. Besides, this was delivered in as the foundation for a sale for 24,000*l*. The sale which took place was for 22,000*l*., as the price has been altered, so the parcels to be sold, and other particulars of the sale, may have been changed; and this catalogue can be no evidence of the terms of the second contract, or even of its existence.”(q)

A writing which did not purport to be a memorandum, but was only a notification of adhesion to a verbal agreement which had been provisionally arranged, is not sufficient.(r) So a reservation in a deed to a third person of the possible rights of the plaintiff, of which rights the deed expressly disclaimed any acknowledgment, is insufficient.(s) An order by a lessor to the lessee to pay his rent to a certain third party does not,

(q) *Cooke v. Tombs*, 2 Anstruther, 424.

(r) *McElroy v. Buck*, 35 Mich. 435.

(s) *Craig v. Lewis*, 110 Mass. 379; see *Temple v. Johnson*, 71 Ill. 16. A curious instance of writings held not to show a concluded contract is to be found in a not altogether luminous report in 12th Vesey. Gaskarth, a vendor, wrote to Lord Lonsdale, who was in treaty for his land, a letter, indicating a desire to continue the negotiations; and, receiving no reply, he gave written notice at first that the affair was at an end, and finally one, declaring that if, by a certain date, his terms were not accepted, it would be too late. After the date fixed, Lord Lonsdale brought a bill for specific performance, to which Gaskarth made answer that he had

entered into the contract and was willing to fulfil it (but suggesting that he had the right to refuse); upon which the court decreed specific performance if Lord Lonsdale made a certain payment into bank, which was upon terms very favorable to the vendor. Before the payment into bank, indeed before the decree but after the bill (and *semble* answer) filed, Lord Lonsdale made certain devises of his land, and the present action was brought by Gaskarth to revive the previous proceeding, but only, it would seem, to enable the court to decide whether the land in question went to Lord Lonsdale's heir or to his devisee, who were the real parties to the dispute. It became, then, necessary to determine whether Lord Lonsdale had, when his will was

as an assignment of the rent, bind the assignee in bankruptcy of the lessor, the order being revocable.(t) Where a child worked for his parent, and the evidence showed that the reward therefor was understood as a gift, and not as a binding promise, the child could not enforce the gift.(u) That an execution-debtor has, under the provisions of a statute, designated in writing out of what land the sheriff should make satisfaction, does not validate an invalid execution.(v) It must be remembered that a writing is construed to be not intended as a memorandum under the Statute of Frauds when its language, or the circumstances under which it was made, show that it had not only another purpose, but that the writer, in making it out, did not mean to describe the agreement. Because, as we have seen, any statement of the contract, if sufficient in other respects, is not the less available as evidence because it was never prepared with the object of becoming evidence.(w)

§ 394. A difficult point arises when the memorandum states the contract, but the party making it disclaims all liability under it, and it is only gradually that ^{Memorandum denying liability} English authority has determined the validity of such a writing. It was said that a memorandum of the kind might, perhaps, do.(x) And where the defendant wrote the plaintiff, saying that it was inconvenient for him, the defendant, to carry out the contract, and asking the plaintiff to try and get another person to take up the bargain, the Statute was satisfied.(y) Where the defendant wrote, "the goods

made, an equitable title, or whether he only obtained this by the subsequent payment into bank; and Lord Eldon held that Gaskarth's letter showed no concluded contract, and while the chancellor would appear to have looked upon the admission of the bill and answer as satisfying the Statute of Frauds, he held, whatever their effect, there was nothing final or binding till the money was paid, for until then the plaintiff could have had his bill dismissed. Gaskarth was therefore directed to make his deeds to

Lord Lonsdale's heir-at-law. *Gaskarth v. Lowther*, 12 Ves. Jr. 107.

(t) *Ex parte Hall*; *Re Whitting*, 10 Ch. D. 615; S. C., *sub nom. Ex parte Rowell*, 27 W. R. 64.

(u) *Jibb v. Jibb*, 24 Grant, 493.

(v) *Geoghegan v. Ditto*, 2 Metc. (Ky.) 436.

(w) See *supra*.

(x) *Laythoarp v. Bryant*, 2 Bing. N. C. 735; see 9 Am. L. Rev., 435.

(y) *Shippey v. Derrison*, 5 Esp. N. P. C. 191.

selected, etc., were the chimneys, which goods I have never received, and have long since declined to have," etc. (the goods were destroyed in the transit), the Statute of Frauds was held to be satisfied.^(z) In another case the defendant wrote: "The cheese is come to-day, but I do not take them in, for they were badly crushed, so the candles and cheese is return," and this also was sufficient.^(a) Where the defendant wrote: "It is now twenty-eight days since you and I had a deal for my wool . . . I shall consider the deal off, and you have not completed your part of the contract;" and the next day wrote, "I inclose copy of your letter of sale," etc. (this copy contained the memorandum of sale), the Statute was satisfied.^(b) So a letter by way of answer, sent upon receipt of an invoice in the usual form, in which the buyer of the goods objects to their quality and condition, together with the invoice, was held sufficient under the Statute of Frauds.^(c) A written statement of the contract is sufficient, though it averred that the defendant owed and would owe nothing under the agreement till a certain date.^(d) In a recent Massachusetts case, it was held that a memorandum containing an express repudi-

(z) *Bailey v. Sweeting*, 9 C. B. N. S. 857; 30 L. J. C. P., 150; 9 W. R., 273 (denying the remark of Lord Blackburn in his work on Sales, p. 66).

(a) *Wilkinson v. Evans*, L. R. 1 C. P. 410; 35 L. J. C. P., 224; see *Saunders v. Jackson*.

(b) *Buxton v. Rust*, L. R. 7 Ex. 280 (Exch. Ch.). Blackburn, J., said, quoting from his work on Sales, p. 66, "that the point has been clearly settled, since the publication of that book, by the decisions of the courts of Common Pleas, . . . and from which I do not see any reason to dissent. The rule they establish is as logical and more convenient than that suggested by myself."

(c) *Hicks v. Cocks* (Tredegar County Court), 67 L. T. 386, citing cases; see *McFarson's Appeal*, 11 Pa. St. 509, on the general point. A written notice

by the plaintiff, a buyer, stated all the terms of the contract, to which the defendants answered that they had performed the contract as far as it had gone, and were ready to complete it, and demanding payment for goods already sent, which in his notice the plaintiff had declared to be bad, and which he had refused. The denial of the liability here was only to the part claimed to have been performed; *Jackson v. Lowe*, 1 Bingh. 12. Where the defendants in a letter to the principals referring to a broker's note, denied that they, the defendants, knew any one but the broker in the matter, they may be liable in spite of their disclaimer; *McCaul v. Strauss*, 1 Cab. & Ell. 106.

(d) *Johnson v. Trinity Church*, 11 Allen, 123.

ation of the contract binds because the writing is evidence merely, and does not go to make the contract.(e) Where an agent of the defendants, the vendors of land, wrote them reporting the sale to the plaintiff, his letter is a sufficient memorandum binding the defendants, and is not affected by the fact that the defendants wrote the plaintiff, saying that K. had reported the sale to them, and adding that they approved it as to one part but not as to another.(f) Where, in the case of a marriage-treaty, the lady's father wrote to the proposed husband and to the latter's father, stating his intention, he was held bound, though he said the evening before the marriage that he would revoke his consent, the marriage having taken place, and the promised payments having been made for a period of time.(g) Besides the remarks of Lord Blackburn, a *dictum* of Judge Littledale,(h) and a decision by Lord Tenterden show that opposite views may be intelligently entertained on this question.(i) A letter acknowledging the contract in suit, but refusing to carry it out because the plaintiff had failed to do his part within a certain time, does not bind the defendant, though the plaintiff offered to show by oral

(e) *Townsend v. Hargraves*, 118 Mass. 325, citing several cases.

(f) *Ockley v. Masson*, 1 Can. Law Times, 203 (6 Ont. App. 108).

(g) *Sitger (Ex p.)*, Mont. 100.

(h) *Gosbell v. Archer*, 2 A. & Ell. 503; 4 N. & M. 494.

(i) Lord Tenterden's case was as follows: The plaintiff on January 25th sent by a carrier certain hops to be taken from Worcester and delivered to the defendant, at Derby, and sent an invoice describing the defendants as buyers, and the plaintiffs as sellers of the hops. On the 27th of February, the defendant wrote plaintiff thus: "The hops (five pockets) which I bought of Mr. Richards, on the 23d of last month, are not yet arrived, nor have I ever heard of them. I received the invoice: the last was much longer than they ought to have been on the

road, however, if they do not arrive in a few days, I must get some elsewhere, and, consequently, cannot accept them," and Lord Tenterden said: "I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the Statute of Frauds. Even connecting it with the invoice, it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold that if a man were to write and say, I have received your invoice, but I insist upon it, the hops have not been sent in time, that would be a note or memorandum in writing of the contract sufficient to satisfy the Statute. I think the case of *Cooper v. Smith*, 15 East, 103, in substance is not distinguishable from this case;" *Richards v. Porter*, 6 B. & C. 437; see *Newberry v. Wall*, 65 N. Y. 488.

proof that the performance by him within a fixed time formed no part of the agreement.(j)

§ 395. The memorandum must show a concluded contract, leaving no *jus deliberandi* or *locus penitentiæ*.(k) One claiming specific performance of a contract within the Statute of Frauds must produce a written agreement so complete and perfect as to manifest clearly to the court the terms of the contract, and the intention of the parties.(l) The words, "I have concluded to let you have," etc. etc., imply that there was a previous offer, which is accepted, and the memorandum is sufficient under the Statute of Frauds.(m) The closing words of a letter, "Waiting your reply," were after some hesitation held, in an English case, not to prevent the contract being regarded as closed, the rest of the letter showing plainly an offer and its acceptance, and there being some extrinsic inquiries made in the letter to which answer was desired.(n)

(j) *Cooper v. Smith*, 15 East, 107. The following memorandum was held insufficient as not containing a promise: "It is admitted that Daniel" (the plaintiff) "has tendered the purchase-money" (giving the amount) "for eighteen negroes" (naming them) . . . "and he has offered to comply with the terms of sale by paying for and taking the property. But I have been notified not to comply with the terms of sale on my part, on the ground of inadequacy of price, etc., and that Loper" (the execution defendant) "had an absolute estate, and, therefore, have refused to comply." The court, two judges dissenting, thought that this meant, "I sold only a life estate in the negroes, and, as you claim more, I will not comply with the estate as you understand it;" *Daniel v. Harley*, 3 Strob. 233.

(k) *Williams v. Morris*, 95 U. S. S. C. 456.

(l) *Godwin v. Collins*, 4 Houst. 55. The following are some examples of concluded contracts: A written pro-

posal of terms signed by the defendant, and a letter from him to the plaintiff, saying "I am glad you have determined to purchase Watering Farm," etc., are sufficient; *Western v. Russell*, 3 V. & B. 191.

The following credit in an account: "By my purchase of" (describing the land) etc., "this day, as agreed on between us," etc., is enough, the present tense showing a final agreement; *Barry v. Coombe*, 1 Peters, 651.

(m) *Pierce v. Small*, 10 U. C. C. P. 162.

A written memorandum describing the lands, and agreeing as to a lease of them, binds, though in the description of the land the words occurred "coal lying under lands to be hereafter defined in the Bank End Estate," etc., and though a draft-lease was prepared which was never executed. The agreement held it to be final, for both the lease and the fuller definition were formal matters; *Haywood v. Cope*, 25 Beav. 147.

(n) *Watts v. Ainsworth*, 1 H. & C. 89. Where, after a negotiation in which

Where the vendor, in accepting a purchaser's offer, wrote that this was under the inducement that the latter would improve the land sold, and the purchaser wrote, declining to be so bound, and said that the offer had better be reconsidered, and the vendor replied that the acceptance of the offer was not intended to be conditional, but that the purchaser might improve, or not, as he liked, the latter was held to be bound.^(o) A written request for a license to use a patent, for a sum "as agreed," was held to indicate a completed agreement, and not a mere proposal, and to be therefore subject to an agreement stamp.^(p) A memorandum of marriage settlement was as follows: "Mr. J. P. Thomson" (the defendant's testator) "proposes to pay down, etc., the sum of . . . and also intends to leave a further sum of . . . in his will to Miss Thomson, to be settled . . . These are the basis of the arrangements proposed, subject of course to revision, but they will be sufficient for Baron De Biel" (the plaintiff, who married the daughter of Mr. Thomson) "to act on." J. P. Thomson wrote a letter recognizing the memorandum, and after the marriage a formal

certain modifications to an original draft of the contract are made, and the plaintiff seeks to have these changes changed, but finally accedes to the original contract subject to these changes, he is bound; *Jolliffe v. Blumberg*, 18 W. R. 784; see, for the converse rule, *Lucas v. James*, 7 Hare, 418.

(o) *Rossiter v. Miller*, L. R. 3 App. Cas. 1129; 48 L. J. Ch., 10; 39 L. T., N. S. 173; 26 W. R., 865; 24 Moak, 712 (n.) (Dom. Proc.), reversing the same case below before the Lords Justices; 5 Ch. D., 658.

In another English case the plaintiff, proposing to buy the defendant's land, instructed his agent to negotiate; the defendant wrote to his own agent, "If Cowper (the plaintiff's agent) will give 2000 guineas he shall have the estate;" Baxter, the defendant's agent, wrote Cowper of this, adding that as the estate was worth more he must

write again to the defendant; Cowper replied to Baxter, "That between gentlemen the agreement ought to stand," and the Statute of Frauds was regarded as complied with; *Howard v. Okeover*, 3 Swanst. 421.

In an Irish case the plaintiff makes a verbal offer to the defendant to buy his lease, and the defendant writes to one McK. accepting the offer with a condition; on this letter McK. endorses and signs a statement that the plaintiff had deposited with him the price of the lease until settlement had with the defendant; that he, McK., had considered the price high in view of the condition annexed by the defendant; and it was held that McK.'s endorsement and payment of the purchase-money sufficiently showed the plaintiff's acceptance of the condition; *Field v. Bolland*, 1 Drew. & W. 48.

(p) *Chanter v. Dickinson*, 5 M. & G. 259.

settlement was made, which, however, left out one of the provisions; the Master of Rolls, and afterwards the Lord Chancellor, and finally the House of Lords, all thought that the memorandum showed a concluded contract, subject to a possible revision, which was never had, and that therefore the defendants were bound.(g)

§ 396. The following are some examples of negotiations regarded as not amounting to a concluded contract:

Examples of contracts not concluded. Thus, where one of the parties to a marriage-settlement, the wife's parent approved of a draft, but wished to have a solicitor also approve and the latter approved, but the parent died before knowing this, it was held that there was no completed agreement, even by parol, so as to lay ground for equitable part performance.(r) Where the strongest words in a memorandum were "the agreement which your client alleges he has entered into."(s) Where A. and B. had bought, it was alleged, lands together, under an agreement to share the profits, and B. took the title and paid the price, and the land was sold at a loss, it was held that a letter from B. to A., "I think we can get for the house in February a profit on what we paid," is not a sufficient memorandum, and B. cannot recover from A. a half of the loss.(t) In the note will be found the citation of decisions which are examples of written offers which expressly call for discussion of terms, and which are not evidence of final agreement;(u)

(g) *Hamersley v. De Biel*, 12 C. & F. 73 (Dom. Proc.), affirming S. C. below before the L. C., id. 63, note, and before M. R., 3 Beav., 469.

For some examples of concluded contracts in general, see the citations below: *Arnold v. McLean*, 4 Grant, 347; *Sanborn v. Nockin*, 20 Minn. 179; *McBlain v. Cross*, 25 L. T., N. S. 804; *Watts v. Ainsworth*, 1 H. & C. 86; 6 L. T., N. S. 254; *Napier v. French*, 40 N. Y. Super. 122; *Givens v. Calder*, 2 Desaus. 171; *Barstow v. Gray*, 3 Greenl. 409; see Will. Pers. Prop. (11th ed.), 103-4. For examples of sufficient acknowledgment of indebtedness to satisfy the statute of limitations, see

the chapter on Limitations and the following cases: *Hartley v. Wharton*, 11 A. & E. 934; *Martin v. Mayo*, 10 Mass. 137; *Whitney v. Dutch*, 14 Mass. 457; *Bobo v. Hansell*, 2 Bailey, 114.

(r) *Thynne v. Lord Glengall*, 2 Cl. & Fin., N. S., 157; 2 H. L. C., 94.

(s) *Jackson v. Oglander*, 2 H. & M. 472.

(t) *Babcock v. Reed*, 5 N. Y. Monthl. L. Bull. 23 (Super. Ct. N. Y.).

(u) *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 280; *Gaunt v. Hill*, 1 Stark. 10; *Bertel v. Neveux*, 39 L. T., N. S., 259; *Rummens v. Robins*, 3 De G., J. & S. 92.

and the following are written acceptances of a like character.(v) A memorandum giving a refusal of land and a right to take possession, subject to future arrangement, does not evidence a final agreement.(w) A letter saying, . . . "I wish you to make the title to the land I bought of, etc.; you would get the particulars of the land and the value, etc., to be made free from Mr. Bracebridge, does not show the terms of a contract.(x) A vendee's letter in answer to one from the vendor, which said, "previously to paying the amount, etc., it would be advisable to have some information as to the title, the identity to the lands, etc.," was insufficient, as not showing a concluded contract.(y) In a recent case of some interest the vendor's agents authorized to sell only on certain terms so instructed by writing their sub-agent. To a purchaser procured by the latter to make an offer in ignorance of the special terms, the original agents wrote, "We have been instructed by the Marchioness of Ely" (the defendant) "to proceed with the sale to you, etc., the draft contract is being prepared, and will be forwarded for approval," and it was held that "proceeding with the sale" meant proceeding with the negotiation, and that even if the agents meant to close the contract they had no power to do so except upon the special terms.(z) Where the written ac-

(v) *Patton v. Develin*, 2 Philada. 103; *Ball v. Bridges*, 22 W. R. 552; *Stanley v. Dowdeswell*, L. R. 10 C. P. 105; *Lucas v. James*, 7 Hare, 418.

(w) *Parkhurst v. Van Cortlandt*, 14 Johns. 15.

(x) *Rose v. Cunynghame*, 11 Ves. 551; see *Donnison v. People's Café Co.*, 45 L. T., N. S., 189.

In a modern English case the facts were as follows: The defendant's solicitors sent an engrossment of a conveyance of the land containing the following recital: "Whereas the vendor has contracted with the purchaser for the absolute sale to him of the said lands and hereditaments at or for the price or sum of £360;" and the court said "this engrossment bears no date and is unsigned. If I develop the

meaning of the letter and the inclosed engrossment, it seems to amount to this, 'we believe that there is either a contract to sell this land, or that there will be such a contract at the time when the conveyance is executed and the purchase-money paid by the purchaser.' The Statute requires that a concluded agreement, existing at the time when the memorandum is signed, should be proved by the plaintiff, whereas the document, as I have said, shows no actual existing agreement;" *Munday v. Asprey*, L. R. 13 Ch. Div. 857; 42 L. T. Rep., N. S., 144; 49 L. J. Ch., 216; 28 W. R., 347.

(y) *Savile v. Kinnaird*, 11 Jur., N. S., 198.

(z) *Chinnoek v. Ely* (Marchioness of), 11 Jur., N. S., 329; 12 L. T., N.

ceptance of an offer makes a new term or condition there is no concluded contract shown, but *quære*.(a) Where one letter of a correspondence speaks of the sale, describing it, but does not refer to the quality of the goods sold, and the reply thereto makes certain requirements as to the quality, there is no concluded agreement shown.(b) A written acceptance of an offer to sell land which arranges for a meeting, and for further negotiation, is not sufficient, and where the time of payment of a large proportion of the purchase-money secured by mortgage is left open, no final contract is sufficiently shown.(c) *Query*, whether an acceptance by the plaintiff of the memorandum as stated by the defendant is good; probably it would be if the acceptance amounted to a withdrawal of the plaintiff's original written offer.(d) In the note below will be found a number of decisions in which the writings were held insufficient under the Statute of Frauds, because therein appeared no concluded contract.(e)

S., 251; 13 W. R., 597, reversing Wood, V. C., 2 H. & M., 228; 11 L. T., N. S., 536; 11 Jur., N. S., 32; 13 W. R., 176.

(a) Carter v. Shorter, 57 Ala. 257; Cartwright v. Miller, 36 L. T., N. S., 399; Jordan v. Norton, 4 M. & W. 160; Holland v. Eyre, 2 S. & S. 196; Forster v. Rowland, 7 H. & N. 106; 30 L. J. Exch. 399; O'Fay v. Burke, 8 Ir. Ch. 225, 511; Hamilton v. Terry, 21 L. J., N. S., C. P. 134.

(b) Smith v. Surman, 4 M. & R. 463.

(c) Potts v. Whitehead, 20 N. J. Eq. 58.

(d) In Lyman v. Robinson, 14 Allen, 254, it was especially said that the suggested change was neither accepted nor performed by the other party.

(e) Hussey v. Horne-Payne, L. R. 4 App. Cas. 311; 27 W. R., 585; 41 L. T., N. S., 1; 48 L. J. Ch., 846; 25 Moak, 569 (note); 26 W. R., 703 (L. J. J.); 47 L. J. Ch., 519; 38 L. T., N. S., 341 (Malins, V. C.); Horsfall v. Garnett, 6

W. R. 387; Chevely v. Fuller, 13 C. B. 122; Glengal (Earl of) v. Barnard, 1 Keen, 788; Honeyman v. Marryatt, 6 H. L. C. 112; 21 Beav., 18; Nesham v. Selby, L. R. 7 Ch. 407; 41 L. J. Ch., 551; Bawdes v. Amhurst, Prec. in Ch. 402 (see Welford v. Bezely, 3 Atk. 503; 1 Wils., 118); Warner v. Willington, 3 Drew, 529; 25 L. J. Ch., 663; 2 Jur., N. S., 433; Newport v. Spivey, 7 L. T., N. S., 328; Appleby v. Johnson, L. R. 9 C. P. 158; Bolekow v. Seymour, 17 C. B., N. S., 117; Stratford v. Bosworth, 2 V. & B. 344; Clarke v. Fuller, 16 C. B., N. S., 36; Pulbrook v. Lawes, L. R. 1 Q. B. D. 288; 45 L. J. Q. B., 179; Sands v. Soden, 10 W. R. 765; Wagner v. Egleston, 49 Mich. 222; Hunt v. Reynolds, 9 R. I. 305; Nelson v. Hagerstown Bank, 27 Md. 72; Howard v. Carpenter, 11 Md. 276; Reynolds v. Dunkirk R. R., 17 Barb. 615; Hough v. Brown, 19 N. Y. 111; Allen v. Roberts, 2 Bibb, 98; Springle v. Morrison, 3 Litt. 53; Freeport v. Bartol, 3 Greenl. 345; Lincoln v. Erie

§ 397. If the memorandum sufficiently sets out the agreement, it is not the less a compliance with the Statute that the parties agree that a more formal instrument to the same effect shall be executed by them.^(f) There was an offer and acceptance as follows: You may make Mr. Eadie an offer of the Tweeddale Arms Hotel at, etc., from Lady-day, 1881; a proper lease to be drawn up, with all proper clauses, and approved of by me and my solicitor, and executed before the commencement of tenancy, and if not, this offer to be void. I am in receipt of your letter of yesterday, containing Mr. Addison's offer of the Tweeddale Arms Hotel, Tamworth. I consider the rent very high, and the terms somewhat stringent; but as the house stands well, and is respectable, I accept the offer. Please prepare and send me draft lease in due course. The court held that the contract was complete, notwithstanding the approval clause, and the defendant, the owner, could not insist upon a clause against sub-letting.^(g) Where the parties contemplated

The rule when a more formal subsequent writing is contemplated.

Preserv. Co., 132 Mass. 130; *Stagg v. Compton*, 81 Ind. 171. For examples of insufficient acknowledgment of indebtedness to take a promise out of the statute of limitations see the chapter on Limitations and the following cases: *Rowe v. Hopwood*, L. R. 4 Q. B. 1; *Hale v. Gerrish*, 8 N. H. 374; *Ford v. Phillips*, 1 Pick. 202; *Wilcox v. Roath*, 12 Conn. 550; *Harris v. Wall*, 1 Exch. 122; 1 Minor, Instit., 540; *Tyler, Inf. and Cov.*, 2d edit., pp. 96 *et seq.*

^(f) *Fowle v. Freeman*, 9 Ves. 354; *Western v. Russell*, 3 V. & B. 187; *Thomas v. Dering*, 1 Keen, 740; 1 Jur., 211; 6 L. J. Ch., 267; *Hamersly v. DeBiel*, 12 C. & F. 73 (Dom. Proc.); *id.* 63 n.; 3 Beav. 469; *Catling v. Perry*, 2 F. & F. 141; *Jones v. Victoria Graving Dock Co.*, L. R. 2 Q. B. D., 321; 46 L. J. Q. B., 219; 36 L. T., N. S., 144; *Bonnewell v. Jenkins*, 26 W. R. 294; 47 L. J. Ch., 758; *McFarson's Appeal*, 11 Pa. St. 510; *Caborne v.*

Godfrey, 3 Desaus. 520; *Raubitschek v. Blank*, 44 N. Y. Super. 564; affirmed 80 N. Y., 480; see *Chinnock v. Marchioness of Ely*, where Westbury, L. C., admitted this rule, but held that in that case a formal paper was required by the contract. See *May v. Thomson*, L. R. 20 Ch. D. 706, 711, where Sir George Jessel said that the making out of a contract from informal letters, where the parties contemplated a formal contract had gone too far. In *Truteau v. Leblanc*, 4 Rev. Leg. 560 (Lower Canada), it was doubted whether a *commencement de preuve par écrit* was sufficient.

^(g) *Eadie v. Addison*, 52 L. J. Ch. 80; 47 L. T., N. S. 543, the court said that *Winn v. Bull* was a case on the line; that there the parties disputed as to the contract; *Pearson, J.*, said that the decision of the Court of Appeals in *Hussey v. Horne-Payne* was reversed in the House of Lords.

a further instrument, chancery, upon discovering the contract from the draft, will, if necessary, decree the instrument intended.(h) Where there has been a clear offer and acceptance of land, both in writing, the following clause in the acceptance, "If you approve of the inclosed, sign the same, and on receipt of the deposit we will sign you a copy," does not affect the matter, though it did not appear that the inclosed had been approved of; and the inclosed was a formal memorandum of the contract.(i) Where a written offer is definitely accepted in writing, the appointment of a time for signing the contract, *i. e.*, the formal contract, does not make the memorandum insufficient.(j) Where a vendor wrote, "I do sell," etc., certain land, and added, "of all of which I shall authorize a formal sale, etc., for," it was held that, under the Louisiana law, this was a valid sale *sous seing privé*, and the promise to give a formal writing seemed to give the memorandum additional strength rather than the reverse.(k) Where there has been a sufficient memorandum under the Statute of Frauds, it is immaterial that an abortive attempt is afterwards made to execute a more formal contract.(l)

In an early English case it was said that where a husband having power under his father's will to settle so much on any wife he might have, and on his marriage he binds himself by articles to settle so much, and dies without signing a settlement, which had been prepared and approved, the article and settlement together are a compliance with the Statute of Frauds, though the unsigned settlement alone might not have been; the settlement was merely an indication of what lands should be settled under the articles.(m) Where the formal

(h) *Fenner v. Hepburn*, 2 Y. & C. C. 162; see *Rossiter v. Miller*, L. R. 3 App. Cas., 1137, in which Lord Blackburn, citing *Ridgway v. Wharton*, called attention to the different manner in which an equity and a common lawyer respectively view this point.

(i) *Gibbins v. Metropolitan Asylum*, 11 Beav. 4; see generally Sug. on Vend. [p. 141].

(j) *Branson v. Stannard*, 41 L. T.,

N. S., 434, distinguishing *Dickinson v. Dodds*, 2 Ch. D. 463; 34 L. T., N. S. 608, as a case where the offer had not been accepted.

(k) *Crocker v. Neily*, 3 Martin, N. S. 583.

(l) *Heyworth v. Knight*, 17 C. B., N. S., 313; 10 Jur., N. S., 866.

(m) *Coventry v. Coventry*, 1 Stra. 604; Gilb., 168; 9 Mod., 19.

instrument is a deed conveying the title, the informal instrument is all the more efficacious, because, as we have seen, the deed is not ordinarily intended for the purpose of a memorandum.⁽ⁿ⁾ It has recently been said by an English judge, that though the point is settled on authority he would be of opinion, if the question were *res integra*, that the formal contract is necessary.^(o) In an Ohio case the rule was laid down, but expressly for cases apart from the Statute of Frauds.^(p) The following are examples of memoranda held insufficient, because a final formal contract was intended to be that which solely should bind. In a late English case the facts were plain: An agreement was executed, expressly "subject to the preparation and approval of a formal contract." There was no formal contract, and the correspondence between the parties showed a difference of opinion as to what covenants should be entered into. Jessel, M. R., said that specific performance on the evidence of informal memoranda was too easily given, and that it is to be presumed that a formal contract may and will contain more than the usual covenants.^(q) Letters to the solicitor of the other party, written by the vendor, are sufficient, if they show the contract, although they state that a formal contract is to be drawn.^(r) That a draft was prepared but not signed by the defendant, and was sent to the plaintiff's solicitor for approval, is immaterial when the informal memoranda showed the contract.^(s) Where the memorandum stating the

(n) See *Givens v. Calder*, 2 Desaus. 171; and see *supra*.

(o) *Fry, J.*, in *Bonnewell v. Jenkins*, 26 W. R. 294; 47 L. J. Ch., 758.

(p) *Blaney v. Hoke*, 14 Ohio St. 296. Where apart from the Statute the parties agree that there shall be a writing, the latter is essential; see *Avendano v. Arthur*, 30 La. Ann. 321; *Des Boulets v. Gravier*, 1 Martin, N. S. 421; *Wolf v. Mitchell*, 24 La. Ann. 435; *Fredericks v. Fasnacht*, 30 La. Ann. 119; *Morrill v. Tehama Mining Co.*, 10 Nev. 135; *Eads v. Carondelet*, 42 Mo. 117; *Congdon v. Darcy*, 46 Vt. 484.

(q) *Winn v. Bull*, L. R. 7 Ch. D.

29; 47 L. J. Ch., 139; 26 W. R., 230.

Where the memorandum speaks of "terms arranged," does not describe them, but refers to "instructions" sent to the solicitor, it is presumed that the parties meant to be bound only by the agreement prepared by the latter; *Ridgway v. Wharton*, 6 H. L. C. 255; 27 L. J., N. S., Ch. 46 (a case not decided without some warmth on the part of the noble lords). See *Wharton v. Stoutenburgh*, 35 N. J. Eq. 274; see *Tawney v. Crowther*, 3 Bro. C. C. 318.

(r) *Thomas v. Dering*, 1 Keen, 741.

(s) *Stammers v. O'Donohoe*, 1 Can.

Law Times, 128 (U. C. Ch.).

terms is accompanied by a draft sent for approval, nothing but an execution of the latter will satisfy the Statute of Frauds.^(t) Where an attorney signed an approval of a draft contract, the Statute of Frauds is not satisfied. If investigations into the property with a view to a final agreement were still going on, and a formal deed was contemplated, citing *Doe d. Lambourn v. Pedigriph*, 4 C. & P. 312, and *Winn v. Bull*, the approval was of the form which the contract should take if it were finally made.^(u) In a Scotch case it was said that a mere draft of a lease, which shows that a formal lease was contemplated, does not bind; and, *quære*, whether it could be validated by *rei interventus* (part performance).^(v) Where an intended husband, having drawn up a rough draft of a marriage settlement, induces the lady expressly to waive it and to marry him, and the settlement, contrary to her solicitor's advice, is so waived by her, the court held that the draft was not intended as final.^(w) A letter of instruction sent by the defendant to his solicitor, directing the latter to draw a lease, saying, "the lease renewed Mrs. Stokes" (the plaintiff) "to pay, etc., and also to pay Moore" (the defendant himself) "£24 a year," etc., was held not to be final.^(x) In an

(t) *Smith v. Webster*, L. R. 3. Ch. D. 50; 35 L. T., N. S. 45; 45 L. J. Ch., 528; 24 W. R., 894; 17 Moak, 797 (note), (the phrase used was, "We therefore send herewith draft-contract for perusal and approval"); *Vale of Neath Colliery v. Furness*, 45 L. J. Ch. 278 (the words being, "I will send draft-contract in due course"); *Chinnock v. Marchioness of Ely*, 13 W. R. 597, *ut supra* (the words being, "the draft-contract is being prepared, and will be forwarded for approval"); in *Rossiter v. Miller*, L. R. 3 App. Cas. 1123, the last case was distinguished, but the Lords Justices below (25 W. R. 890, etc.) had relied upon it; *Ball v. Bridges*, 22 W. R. 552, where the plaintiff wrote, "Confirming the conversation I had with you, I accept the house," etc., and the defendant's attorney an-

swered: "There will be some details necessary to be embodied in the contract of sale, which I will prepare and send you for approval."

(u) *Mogg v. Lord Raglan & Co.*, 4 Viet. L. R. Eq. 143.

(v) *Sinclair v. M'Beath*, Sess. Cas. 7 M. 273; 41 Scotch Jur., 165.

(w) *Caton v. Caton*, L. R. 2 H. L. Cas. 135, etc.; see "Marriage" for a fuller statement of the facts of this case.

(x) *Stokes v. Moore*, 1 Cox's Ch. 221. Where the plaintiff wrote to the defendant: "I agree to take your house, furnished, at the weekly rent of eight guineas, subject to the agreement entered into between us, from the 15th June to the 15th October, 1865." He had previously arranged to draw up and send her the agreement, which he did, and which was a mere agreement

early and well-known case, instructions to counsel to prepare a settlement were held insufficient, as the parties might refuse to execute them; (y) and it has even been doubted whether a draft-contract signed by the defendant's solicitor, and by him sent to the plaintiff's solicitor, would bind the defendant. (z) Where the defendant said, "I should yet have many observations to make, etc., we can, therefore, talk about all this, etc., and afterwards put the whole on stamped paper," it was held that there was no concluded contract, not from want of stamped paper, but because the parties were not *ad idem*. (a)

to let on those terms, with the use of the fixtures and furniture, as per inventory, and contained no stipulation as to the use of the house as a boarding-house. On the 3d June, she wrote to him in London: "I approve of the agreement, and will sign it when you come down."

There were changes as to the payments made and assented to, but no inventory was drawn up, nor was the agreement ever signed. On the 9th, the defendant found that the plaintiff had advertised it as a boarding-house, and wrote to him to say that she should not let him have the house. Crompton, J., charged that there must be a writing to satisfy the Statute of Frauds, and added that the contract need not, however, be all in any one writing, and a letter signed by her referring to and ascertaining the terms of the agreement would be sufficient. There must, however, be some agreement ascertained as the *final* agreement between the parties. If the letter, "I approve of the agreement," was an adoption of it as a final agreement, it would be sufficient. Was it so? Did it amount to a final agreement? That might be a question of law if it was all in writing. It might depend upon whether there were other terms to be added, and whether the agreement approved con-

tained all the terms. No doubt the inventory was not drawn up, and the entrance money was not paid, but these matters might be waived, and it is alleged that they were; *Cavaliero v. Puget*, 4 Fost. & Finl. 538.

(y) *Montacute v. Maxwell*, 1 P. Wms. 618.

(z) *Thornbury v. Bevil*, 1 Y. & C. 562; 6 Jur., 407. In another case the defendant having proposed to take a lease, and having objected to the draft of lease suggested, his solicitors altered the draft, and returned it to the plaintiff's solicitors, and requesting its return if satisfactory, in order that they, the defendant's solicitors, might engross the lease; and the plaintiff's solicitors then claimed the right to engross the lease, and charge the cost to the defendant; and on this point the negotiations went off. It was held that the letter of the defendant's solicitors returning the draft showed an incomplete contract, one of the terms of the latter not having been agreed upon, and, therefore, the defendant was not bound; *Forster v. Rowland*, 7 H. & N. 106; 30 L. J. Exch. 399 (in this case as in *Chinnoek v. Ely*, the agents had no authority to make a binding contract).

(a) *Bertel v. Neveux*, 39 L. T., N. S. 259. And where the vendor's agent wrote after describing the contract,

A modern New York case exhibits an extreme application of the rule requiring the execution of the writing proposed in the informal memoranda. The plaintiff, Van Keller, bought of S. his interest in a certain contract with H. A. S. & Co., and wrote the latter, directing them to give S. credit for \$20,000 due them by S. under the contract, and to charge the amount to him, the plaintiff, and saying that S. would authorize them to transfer to him the interest of S. under the contract. S. wrote H. A. S. & Co., directing them to transfer to the plaintiff the interest in question, and to credit him, S., with the \$20,000, charging this sum to the debit of the plaintiff. H. A. S. & Co., who were also the bankers of S., had not made the entries when S. revoked his order, but one of the partners had verbally assented to the transfer, etc. When the letters were received, nothing was due S. It was held on these facts, that the Statute of Frauds was not satisfied, and that, therefore, the plaintiff could not recover.^(b) A memorandum which said, "with regard to the covenants to be inserted in the lease, I should suggest that they be similar to those contained in Mr. Potter's lease," is not final.^(c) A memorandum which read, "the terms to be expressed in an agreement to be signed as soon as prepared," was said not to be final.^(d)

§ 398. The memorandum by itself, or by reference to another writing, must show the whole contract, namely, the promise, the parties, the subject-matter, the price or consideration, and the terms or conditions.^(e) It

The memorandum must show the whole contract.

etc., "there will be the usual clauses in contract and some limitations of title to be shown, and other minor details. Shall we send you draft-contract?" to which proposal the vendee wrote, asking to have the draft sent him, it was held to be no concluded contract; *Rummens v. Robins*, 3 De G. J. & S. 92.

^(b) *Von Keller v. Schulting*, 50 N. Y. 115.

^(c) *Cartwright v. Miller*, 36 L. T., N. S. 399; see *Butler v. Powis*, 2 Colby, 161.

^(d) *Wood v. Midgeley*, 2 Sm. & G. 115 (a dictum).

^(e) *Clerk v. Wright*, 1 Atk. 12; *Wood v. Midgeley*, 2 Sm. & G. 115; *Vale of Neath Colliery v. Furness*, 45 L. J., N. S., Ch. 278; *Saunders v. Cramer*, 5 Ir. Eq. Rep. 12; S. C., *sub nom.* *Green v. Cramer*, 2 Conn. and L. 54; 3 Drew. & W., 87; *Smith v. Arnold*, 5 Mason, 416; *Barry v. Coombe*, 1 Peters (Sup. Ct.), 650; *Remington v. Linthicum*, 14 Pet. 84; *Williams v. Morris*, 95 U. S. S. C. 454; *Adams v. McMillan*, 7 Porter, 80; *Lewis v. Wells*, 50 Ala. 205; *Moss v.*

has been said that, "to satisfy the Statute, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, if any, without any aid from parol testimony."(*f*) These several component parts of a contract will be severally considered, and the exceptions and limitations to the general rule will then be given. Lord Hardwicke said that the memorandum of an agreement within the Statute of Frauds must not, if it is to be specifically enforced, be doubtful on a single point.(*g*) Where the memorandum does not contain the whole agreement, but part of it is to be found in a conditional acceptance of the writing, the Statute of Frauds is not satisfied.(*h*) In a letter relating to a proposed mortgage not yet made the defendant said: "I will take any responsibility on myself respecting it should there be any," and this was held an insufficient memorandum, as there was no written evidence to show what the contract of mortgage was.(*i*)

Atkinson, 44 Cal. 3; Nichols v. Johnson, 10 Conn. 198; Ennis v. Waller, 3 Blackf. 476; Barickman v. Kuykendall, 6 Blackf. 22; Doty v. Wilder, 15 Ill. 407; McConnell v. Brillhart, 17 Ill. 360; Farwell v. Lowther, 18 Ill. 252; Wood v. Davis, 82 Ill. 312; Kay v. Curd, 6 B. Mon. 101; Rabassa v. Orleans Nav. Co., 5 La. Rep. 461; Mumford v. Bowman, 26 La. Ann. 415; Stoddert v. Bowie, 5 Md. 33; Atwood v. Cobb, 16 Pick. 230; Horton v. McCarty, 53 Me. 394; Washington Ice Co. v. Webster, 62 Me. 355; Comer v. Baldwin, 16 Minn. 172; McGuire v. Stevens, 42 Miss. 724; Connell v. Mulligan, 21 Miss. 390; Scarritt v. St. John's M. E. Church, 7 Mo. App. 178; Stewart v. Garvin, 31 Mo. 36; Sherburne v. Shaw, 1 N. H. 159; Jackson v. Catlin, 2 Johns. (N. Y.) 260; Abeel v. Radcliffe, 13 Johns. 300; Peltier v. Collins, 3 Wend. 465; Stocker v. Partridge, 2 Roberts. 202;

Cushman v. Burritt, 14 N. Y. Week. Dig. 59 (S. C. N. Y.); Parrish v. Koons, 1 Pars. Eq. 84; Eargood's Estate, 1 Pearson, 400; McFarson's Appeal, 11 Pa. St. 503; Ross v. Baker, 72 Pa. St. 190; Martin v. Duffey, 4 Phila. 75; Neufville v. Stuart, 1 Hill's Eq. 166; Meadows v. Meadows, 3 McCord, 458; Wilburn v. Spofford, 4 Sneed, 699; McCarty v. Kyle, 4 Coldw. 354; Sheid v. Stamps, 2 Sneed, 172; Johnson v. Granger, 51 Tex. 43; Fulton v. Robinson, 55 id. 404; Smith v. Jones, 7 Leigh, 165; Buck v. Pickwell, 27 Vt. 163; see, also, Chitt. Eq. Dig., p. 71, pl. 15 *et seq.*, pp. 72-3.

(*f*) Williams v. Robinson, 73 Me. 195.

(*g*) Middleton (Lord) v. Wilson, cited in Popham v. Eyre, Lofft, 801.

(*h*) Boys v. Ayerst, 6 Madd. 324.

(*i*) Holmes v. Mitchell, 7 C. B., N. S. 370; 28 L. J. C. P., 301, distinguish-

§ 399. The memorandum must show the terms and conditions of the sale,^(j) and the rule is the more rigidly applied in the case of public sales, that conditions of sale previously published are customary.^(k) Under the head last given of what is essential to make the memorandum the sufficient evidence of a promise and agreement concluded, there were many examples of writings given in which the question for decision was the suggested omission of a term or condition of the contract, as showing that the memorandum did not contain a perfected agreement. The following are principally examples of memoranda imperfect merely from the omission of an essential term or qualification of the contract, which, on its face, appears to be complete. An agreement of lease of freehold was held to be insufficient, which showed an agreement to buy and a statement of the amount of the rent, the alleged omission being a covenant to keep in repair.^(l) A stipulation in a memorandum of lease, providing that the lease "shall be subject to such covenants as are usual in leases granted by the said

ing Shortrede *v.* Cheek and Bateman *v.* Phillips, as cases where there was an existing document or an existing debt; see Fowler *v.* Lewis, 3 A. K. Marsh. 445, and Washington Ice Co. *v.* Webster, 62 Me. 355; and see *supra*.

In a doubtful case in 7 Me. 143, Cope-land *v.* Wadleigh, an outside oral contract was by reference included (*semble*) in the written contract; but following the general rule, see Lyons *v.* Hughes, 1 Viet. L. Rep. Law, 4; where there is part performance an imperfect memorandum may be better than mere oral evidence; see Murphy *v.* Stever, 47 Mich. 524.

(j) Seagood *v.* Meale & Leonard, Prec. Ch. 560; Rishton *v.* Whatmore, L. R. 8 Ch. D. 468; 26 W. R., 827; 47 L. J. Ch., 631; Bates *v.* Terrell, 7 Ala. 134; Eley *v.* Positive Assurance Co., L. R. 1 Exch. D. 28; 45 L. J. Exch., 62; Lewis *v.* Wells, 50 Ala. 205; Burns *v.* Haley, 2 Gilm. 614; Hayden

v. M'Ilvain, 4 Bibb, 58; Ellis *v.* Deadman, 4 Bibb, 467; Madeira *v.* Hopkins, 12 B. Mon. 604; Gill *v.* Bicknell, 2 Cush. 358; Morton *v.* Dean, 13 Mete. (Mass.) 388; Oakman *v.* Rogers, 120 Mass. 214; Freeport *v.* Bartol, 3 Greenl. 345; O'Donnell *v.* Leeman, 43 Me. 158; Connell *v.* Mulligan, 21 Miss. 390; Johnson *v.* Buck, 35 N. J. L. 338; Tallman *v.* Franklin, 14 N. Y. 584; Baptist Church *v.* Bigelow, 16 Wend. 28; Stone *v.* Browning, 68 N. Y. 600; Soles *v.* Hickman, 20 Pa. St. 181; Elfe *v.* Gadsden, 2 Richards. 373; Pipkin *v.* James, 1 Humph. 326.

(k) Macarty *v.* New Orleans Canal Co., 8 Robins. 104; Johnson *v.* Buck, 35 N. J. L. 340; Coles *v.* Bowne, 10 Paige, Ch. 535; Brock *v.* Jones, 8 Tex. 79; Matthews *v.* Baxter, 21 W. R. 741; O'Brien *v.* Barker, 4 New Zeal. Jur., N. S., 64.

(l) Winn *v.* Bull, 7 Ch. D. 29; 47 L. J. Ch., 139; 26 W. R., 230.

obligor," *semble* shows the writing to be defective under the Statute of Frauds.^(m) Where the goods bought were stipulated to be of the best quality, a memorandum silent as to this point was insufficient.⁽ⁿ⁾ Where flour sold at auction was guaranteed (*semble* by parol) to be first class—and this the plaintiff did not deny—the defendant is not liable, when he was refused permission to try the quality of the flour by baking some; the bought-note tendered left out the words "first class."^(n') So a writing omitting a warranty.^(o) A memorandum which left out the proviso that the paper, *i. e.*, commercial, which was to evidence and secure the payment of the price, should be satisfactory to the sellers is insufficient under the Statute of Frauds, and a party has a right to an instruction that such a memorandum is insufficient. Notwithstanding there may be other evidence which was competent to prove these omitted terms, even competent evidence of usage, the instruction containing a proviso that the jury find that there is no such usage.^(p) Where the memoranda consisting of letters, one of these speaking of the sale, describing it, but not referring to the quality of the articles sold, and the reply makes requirements as to the quality, there is no sufficient note under the Statute of Frauds.^(q) A stipulation that payment of goods sold was to be by draft on the defendant's brother was held as not required to be stated in the memorandum.^(r) Parol evidence is admissible to show that sale of certain chattels was by sample under trade usage, though the bought and sold notes did not state this (parol evidence being admissible to annex incidents). The defendant, the buyer,^(s) offered the evidence where the plaintiff wrote the defendant, inclosing an

(m) *Butler v. Powis*, 2 Coll. 161.

(n) *McClean v. Nicolle*, 4 L. T., N. S., 863; 7 Jur., N. S., 999.

(n') *Pratt v. Rush*, 5 Vict. L. R. Law, 423.

(o) *Peltier v. Collins*, 3 Wend. 459 (and this, though the plaintiffs conceded that they had sold under a warrant); *Pitts v. Becket*, 13 M. & W. 751.

(p) *Williams v. Woods*, 16 Md. 246.

(q) *Smith v. Surman*, 4 M. & R. 463.

(r) *Sarl v. Bourdillon*, 1 C. B. N. S., 194; 26 L. J. C. P. 78; so a defectively stated provision in a broker sales-note, which, however, referred to the broker's compensation; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J. Exch., 191; so a direction subsequently given as to the transportation of the articles sold; *Wilkinson v. Evans*, L. R. 1 C. P. 410; 35 L. J. C. P., 324.

(s) *Syers v. Jonas*, 2 Exch. 116.

invoice stating the terms of the contract, and the defendant replied, stating that he had bought by sample, that the goods delivered were below sample, and denying the assertion in the plaintiff's letter that the goods were the same that he, the defendant, had examined when he made the contract. The court said: "It is clear from the letters that he," the defendant, "had bought the flour from the plaintiff upon some contract or other; but whether he bought it on a contract to take the particular barrels of flour which he saw at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with the sample, does not appear; and that which is in truth the dispute between the parties is not settled by the contract in writing.(t) A plaintiff cannot show by oral proof that a certain term, the alleged violation of which by the plaintiff was the reason given in writing by the defendant for refusing to carry out the contract in suit, formed no part of the contract; the plaintiff, if relying upon the written statement of the contract and as given by the defendant, cannot vary it by parol.(u) Oral evidence to show that a sale was by sample has been refused.(v) It may be said here that no attempt is made in this book to collect the authorities which relate to the admissibility of parol evidence of usage to annex incidents to a contract; for, though in this way it may happen that an essential feature of a contract under the Statute of Frauds is proved by parol, the question is one rather of the admission of parol evidence generally to modify a writing in apparent contradiction to the common law rule forbidding such proof. Indeed, wherever the writing is of a contract within the Statute of Frauds, the admission or exclusion of the evidence under the common law rule has a bearing upon the Statute, and to give this entire class of cases would be impracticable. Where a memorandum mentions no time of payment, parol evidence of usage of six months' credit will not make the memorandum defective in not having mentioned

(t) *Archer v. Baynes*, 5 Exch. 629, citing *Richards v. Porter*.

(r) *Wiener v. Whipple*, 10 No. West. Rep. 434; 24 Alb. L. J., 509; (S. C.

(u) *Cooper v. Smith*, 15 East, 107.

Wis.)

such credit. But an instruction which left it to the jury not merely to ascertain the usage but to interpret the writing, is erroneous. The court should have left the question of the usage to the jury, and have hypothetically interpreted the memorandum.(w) Where figures or letters are used by way of abbreviations, they may be explained by usage,(x) or by the trade of the parties, so as to show what the terms of the contract are.(y) So a written agreement for a lease omitting a clause of surrender.(z) It has been said that the date of a memorandum within the Statute of Frauds cannot be proved or corrected by parol.(a) A memorandum omitting the provision that the vendee of land is to support the vendor for a certain period, is insufficient.(b) So a memorandum of a sale at auction upon credit, not stating that a note was to be given with security, waiving valuation and appraisement laws.(c)

§ 400. An important class of decisions is that where the term omitted is the time or manner of performance, as delivery or payment. As a general rule this need not be stated, a reasonable time being inferred;(d) nor need the time of delivery of goods, an immediate cash transaction being presumed.(e) Where no time for taking away goods sold is stated in the memorandum, the law infers a reasonable one, and will not allow proof that it was a condition of the sale that the goods should be at once removed; to do so would contradict the writing.(f) A memorandum not stating the time of payment is sufficient, as an agreement for cash will be presumed.(g) Where a memorandum said nothing as to when the price was to be paid, the inference is of a

The price;
cash or
credit.

(w) *Williams v. Woods*, 16 Md. 246; as to annexing terms to a writing by proof of usage, see *Wigglesworth v. Dallison*.

(x) *Gowen v. Klous*, 101 Mass. 454; see *contra Frank v. Miller*, 38 Md. 458.

(y) *Newell v. Radford*, L. R. 3 C. P. 52; *Coddington v. Goddard*, 16 Gray, 436; but see *Drake v. Seaman*, 27 Hun, 63.

(z) *Kine v. Balfe*, 2 B. & Beat. 343.

(a) *Hewer v. Taylor*, 70 Pa. St. 391.

(b) *German v. Machin*, 6 Paige Ch. 292.

(c) *Norris v. Blair*, 39 Ind. 90.

(d) *Atwood v. Cobb*, 16 Pick. 230.

(e) *Hawkins v. Chace*, 19 Pick. 504; but see *Hopkins v. Roberts*, 54 Md. 316.

(f) *Greaves v. Ashlin*, 3 Campb. 426.

(g) *O'Donnell v. Leeman*, 43 Me. 160; *Ide v. Stanton*, 15 Vt. 689; *Smith v. Jones*, 7 Leigh, 165; *Southwestern Co. v. Stanard*, 44 Mo. 83 (a case not under the statute); *Lockett v. Nicklin*, 2 Exch. 92.

cash contract ; but if the vendor seeks specific performance on this basis, a defence that the sale was on credit will be good, not because of the Statute of Frauds, but on the ground of fraud or mistake ; therefore the vendor acknowledging the truth of the defence can recover, the Statute being satisfied, and the contract as admitted by the plaintiff being more favorable to the defendant than the memorandum itself.(*h.*) That the buyer in fact makes payment after delivery will not affect this rule.(*i.*) Not only does the law presume a cash sale where nothing is said, but parol evidence to show otherwise is, as a general rule, inadmissible.(*j.*) A memorandum which on its face shows a credit, but does not define the latter, is insufficient.(*k.*) And where a plaintiff alleges a sale on credit, and the memorandum states no time of payment, he cannot recover, both because of the Statute of Frauds and because parol proof of the contract alleged would contradict the writing.(*l.*) But in another Massachusetts case, where the pleadings did not commit the plaintiff in this definite way, the court took off a nonsuit, saying that from the silence of the writing there was a presumption of reasonable time for payment, and that they would not assume that on the trial the time of payment would not appear.(*m.*) A Canada chancery case seems to have decided that where the memorandum stated that part of the price was to be secured by mortgage, and gave the amount so to be secured, it was not necessary that the writing should

(*h.*) *Smith v. Jones*, 7 Leigh, 172.

(*i.*) *Brandon Co. v. Morse*, 48 Vt. 326. A memorandum was as follows : Received from Mrs. Catherine Green \$100 on account of payment on house, No. . . . Due on account of rent to date \$120. Endorsed : " This is to show that I agree to sell to Mrs. Capt. Green house . . . for the sum of \$2500, and that when there is \$500 paid and the back rent, I will give her the deed and take a mortgage for \$2000 ; " and it was held that no time or credit was here given ; *Green v. Richards*, 8 C. E. Green, 33, distinguishing *McKibbin v. Brown*, 1 McCarter, 13 ; *Potts v.*

Whitehead, 5 C. E. Green, 55 ; *Nichols v. Williams*, 7 C. E. Green, 63 ; as cases where the writing showed that credit was given, and did not state the terms of the credit.

(*j.*) *Ford v. Yates*, 2 M. & Grang. 559 ; see, however, *Proctor v. Jones*, 2 C. & P. 534.

(*k.*) *Foot v. Webb*, 59 Barb. 53 (and the oral testimony did not remove the doubt) ; *Grace v. Denison*, 114 Mass. 17 ; *Schmeling v. Kriesel*, 45 Wis. 328 ; *Boys v. Ayerst*, 6 Madd. 324.

(*l.*) *Ryan v. Hall*, 13 Metc. (Mass.) 521.

(*m.*) *Atwood v. Cobb*, 16 Pick. 230.

show the time of payment of the mortgage.(n) In Maryland a lax rule seems to have been adopted, for it has been held that, in the case of a written contract of sale of land, the time and manner of payment can be shown by oral evidence;(o) as to show a usage of six months' credit, the memorandum making no provision on the point;(p) and in a New York case there is a suggestion that an uncertain statement, as to time of payment, could be made precise by proof of an oral stipulation.(q) For the purpose of contradicting the memorandum, and showing, by way of defence, that it is incorrect, oral evidence of a sale on credit is admissible to overcome the presumption of a cash sale.(r) There is authority for the proposition that a memorandum must positively say whether the payment is for cash or on credit;(s) and if, in fact, credit was stipulated for, the memorandum must so show;(t) but it is believed that there is no decision which makes it necessary for the memorandum of a cash sale to state that it is for cash. It has, however, been said in Pennsylvania that a memorandum not stating the price and manner of payment is insufficient.(u) Under another head has been considered the question how far a memorandum, which contains an unqualified promise, is defective in not stating the terms and conditions of the contract, and, while it is doubtful whether certain authorities heretofore given(v) can be sustained on principle, it may be said that there is no rule of law requiring us to assume that a contract contained anything more than a bare promise and a consideration (nor

(n) *Devine v. Griffin*, 4 Grant Ch. 568; *Flintoft v. Elmore*, 18 U. C. C. P. 606.

(o) *Paul v. Owings*, 32 Md. 406; but in *Hopkins v. Roberts*, 54 Md. 316, it was held that, under the circumstances, the court would not presume a cash sale, and that the memorandum was defective in not giving the terms of payment.

(p) *Williams v. Woods*, 16 Md. 246.

(q) *Foot v. Webb*, 59 Barb. 53, distinguishing *Wright v. Weeks* as being a case where there was parol evidence to show the time of payment.

(r) *Hinde v. Whitehouse*, 7 East,

281.

(s) *Carroll v. Powell*, 48 Ala. 302; *Wright v. Weeks*, 25 N. Y. 155; see *Ash v. Daggy*, 6 Porter, 259.

(t) *Davis v. Shields*, 26 Wend. 347; and see above *Eargood's Estate*, 1 Pearson, 400.

(u) *Ward v. Orr*, 13 Pitts. L. J., N. S. 417, S. C. Pa.; see *Gault v. Stormont*, 17 N. W. Rep. 215; *McCaul v. Strauss*, 1 Cab. & Ell. 106.

(v) *Holman v. The Bank of Norfolk*; *Plunkett v. Methodist Episcopal Soc.*

even the latter when the evidence is a bond); in absence of proof of further stipulations a memorandum showing no terms or conditions would be therefore sufficient, if it showed a general promise, and there is no evidence that this was not the whole agreement.

§ 401. The memorandum must show the names of both the parties to the contract.(w) Though the memorandum does not expressly name the parties as such, yet if from it, or from the nature of the transaction, they are disclosed it is enough.(x) In a Maryland case it was said that if the memorandum does not state the name of the plaintiff, it cannot be specifically enforced because of the want of mutuality;(y) though this may be looked upon as employing a bad argument to support a good decision. The following are some examples of memoranda sufficiently showing the parties: Where goods were ordered by the defendant of the plaintiff, and a list of them was entered in a book with the words "Order-book" printed on the outside, and "Sarl & Son" (the plaintiffs) on the fly-leaf, and the name and address of the defendant were written by himself at the foot of the list, the Statute of Frauds was held to be satisfied.(z) The following memorandum, "W. W. Goddard" (the defendant) "12 Mos., 7½; 300 bales," signed "S. M. M." (the plaintiff), "W. W. G." (the defendant), was regarded as sufficiently indicating the parties.(a) In a modern

The parties.
Examples
of sufficient
memo-
randa.

(w) *Champion v. Plummer*, 1 B. & P. N. Rep. 254; 5 Esp., 254; *Jacob v. Kirk*, 2 Moo. & Rob. 223; *Skelton v. Cole*, 1 De G. & J. 595; *Jones v. Nanney*, McClel. 39; *Boyce v. Green*, Batty, 616; *Daly v. Coghlan*, 3 Ir. Jur., N. S. 151; *Houck v. Whitby* (Town of), 14 Grant (Ch.) 672; *Archer v. Scott*, 17 id. 249; *Cameron v. Spiking*, 25 id. 117; *Smith v. Arnold*, 5 Mason, C. C. 414; *Barry v. Law*, 1 Cranch (C. C.), 47; *Knox v. King*, 36 Ala. 367; *Hollingsworth v. Martin*, 23 Ala. 597; *Moss v. Atkinson*, 44 Cal. 3; *Cossitt v. Hobbs*, 56 Ill. 231; *Doty v. Wilder*, 15 Ill. 407; *Barickman v. Kuykendall*, 6 Blackf. 21; *Madeira v. Hop-*

kins, 12 B. Mon. 604; *Horton v. McCarty*, 53 Me. 394; *Williams v. Robinson*, 73 Me. 195; *Sherburne v. Shaw*, 1 N. H. 157; *Lang v. Henry*, 54 N. H. 59; *Haydock v. Stow*, 40 N. Y. (1 Hand) 370; *Christie v. Simpson*, 1 Rich (O. S.), 408; *Brock v. Jones*, 8 Tex. 79; *Brent v. Green*, 6 Leigh, 16.

(x) *Webster v. Ela*, 5 N. H. 540 (this was a case outside of the Statute of Frauds).

(y) *Duvall v. Myers*, 2 Md. Ch. 406.

(z) *Sarl v. Bourdillon*, 1 C. B., N. S. 194; 26 L. J. C. P., 78.

(a) *Salmon Falls Co. v. Goddard*, 14 How. (U. S.) 454 (two judges dissenting). So a memorandum as follows:

English case it was said, speaking of a memorandum objected to as not describing the parties: "In the first place, the defendant's name appears on the contract, for the memorandum was signed by Mr. George Smith, as agent for Charles Collins. Then the abstract of title is headed thus: "Abstract of title of Messrs. Bourdillon and Faulkner to" (naming the lot which had been knocked down to Mr. Smith as agent for Mr. Collins); and the defendant having accepted an abstract of title and sent in requisitions, it was held that he could not sustain his objection.(b) An entry of a credit in an account stated: "By my purchase of, etc., as agreed on between us," was thought to sufficiently describe the parties.(c) And the sig-

"Agreed with A. M. Carter for . . . the undersigned, agreeing to deliver the same to William Hudson," and signed by Carter, shows the parties by naming them and using the word "agree;" *Hodson v. Carter*, 3 Chand. 234; 3 Pinn., 213.

(b) *Bourdillon v. Collins*, 24 L. T. Rep., N. S. 345. So a memorandum, "I hereby agree to sell to John Kelly," etc., "and hereby acknowledge the receipt of ten dollars on account," signed by both the parties, shows by the word "agree" that the signers were the parties, and by the context that Kelly was the purchaser; *Thornton v. Kelly*, 11 R. I. 499.

(c) *Barry v. Coombe*, 1 Peters, 651; The court said: "The memorandum set up is in the form of a stated account wholly in the handwriting of . . . Barry, the defendant below, and acknowledged to be a copy made by him, of another also made out in his handwriting, actually signed by Coombe (the plaintiff below), . . . and now in the hands of Barry. So that Barry's name is in the caption, . . . and Coombe's at the foot of the memorandum. The item of the account which relates to . . . the land is in these words, letters, and figures: 'By my purchase of your $\frac{1}{2}$ E. B. wharf and premises

this day, as agreed on between us,' and the credit is carried out in figures, \$7578.63, and deducted the amount charged to Barry. Then follows this memorandum, 'Balance due, G. Coombe fifteen hundred dollars, payable in . . . G. Coombe.' The statement of account in which the items appeared was headed, 'Robert Barry to G. Coombe, Dr.' The court added: "Brief as it is, this memorandum contains a condensed summary of all the essentials to a complete contract. By the use of the present tense it speaks of a thing final and concluded. . . . By the use of the pronouns 'your' and 'us' the parties are distinctly introduced."

An agreement for sale of land did not state the name of the vendor, nor was it signed by him; but on the back of the agreement appeared these words, written by the auctioneer, "O. D. & H. property, near Newmarket, 81 $\frac{1}{4}$ acres. S. J. Stammers." It was proved that the defendant, O. D., owned the land in question, and that there was but one sale to the plaintiff. Several letters also were put in evidence, signed by the defendants, referring to the "Stammers purchase," urging the plaintiff "to close," and threatening suit to compel specific performance. It

nature may itself show that the signer is a party, and evidence his part of the contract: as where a contract read as being between the plaintiff and one of the defendants, was not signed by the plaintiff, but was signed by both defendants, it was held that the signer not named in the contract was bound either as principal or surety.(d) A memorandum guaranteeing the payment of a certain sum due by J. M. V. to Mordecai, the plaintiff, and signed by them and by the defendant, is sufficient.(e) So where the defendant signs with the plaintiff a paper, in which the former says: "I do hereby agree to take the lot.(f) Where the pleadings admit that the plaintiffs were the vendors, a memorandum omitting to describe the latter is made sufficient.(g) A memorandum of part of a contract insufficient under the Statute of Frauds, because not naming one of the parties, requires a stamp as an agreement.(h)

§ 402. Several writings, as has already been seen, may be taken together to constitute the memorandum required by the Statute of Frauds,(i) and the following cases show an application of the rule to the present point. Where the memorandum having failed to state the vendor's name, the vendee wrote a letter to the solicitors of the latter in which he mentioned the latter's name, the two papers together are enough.(j) So where the vendor directed his agent to "close the sale," and

was held that the Statute of Frauds was satisfied; *Stammers v. O'Donohoe*, 1 Can. Law Times, 128 (U. C. Ch.). In *Young v. Schuler*, 11 Q. B. D. 653 (C. App.) (see § 384 n. (b)), *Grove, J.*, below, thought the phrase, "now it is distinctly understood between all parties to this contract that J. Otto Schuler should guarantee," etc., might imply that Schuler was not a party to the contract, but this doubt was removed by Schuler's signature.

(d) *Clark v. Rawson*, 2 Denio, 135.

The plaintiff signed an agreement to purchase land, and the defendant gave a receipt as follows: "Received of Mr. George Long the sum of, etc., as a deposit on the purchase of three plats of

land at," etc.; the defendant's, the vendor's, name did not appear in either, except as his signature to the receipt; the Statute of Frauds was held to be satisfied; *Long v. Miller*, 48 L. J. Q. B. 596; 27 W. R., 720 (before the Lords Justices).

(e) *Mordecai v. Gadsden*, 2 Speer, 571.

(f) *Cadwalader v. App*, 81 Pa. St. 210.

(g) *Clarkson v. Noble*, 2 U. C. Q. B. 364.

(h) *Ramsbottom v. Mortley*, 2 M. & S. 445.

(i) See Chap. XIII.

(j) *Irvine v. Dane*, 2 Ir. Jur. 210.

on the same paper the vendee wrote and signed an acceptance of the terms.(k) So a memorandum signed by the plaintiffs was accompanied by a counterpart signed by the agents of the defendants, but which did not contain the plaintiff's name.(l) So where the vendors wrote: "will take for, etc., 160 acres, etc., \$300," etc., and signed this, and on the same paper the vendee wrote and signed: "Your terms are accepted."(m) But, on the other hand, a memorandum addressed to a broker, authorizing a sale on certain terms signed by the vendor, but naming no vendee, and afterwards written across by the vendee accepting these terms, was held in New York to be insufficient.(n) Where a guaranty was not addressed to the plaintiffs, and did not mention their name, a letter from the guarantor stating that the guaranty was intended to be given them, the evidence is sufficient.(o) A memorandum written before the sale, and not naming any vendee, being a request to a master making the sale not to let the property go below a certain price, is insufficient in not showing the parties.(p)

(k) *Forbis v. Shattler*, 2 Cinn. Rep. 95.

(l) *Lerned v. Wannemacher*, 9 Allen, 416.

(m) *Cossitt v. Hobbs*, 56 Ill. 231.

(n) *Haydock v. Stow*, 40 N. Y. (1 Hand) 363.

(o) *Brettel v. Williams*, 4 Exch. 628.

(p) *Kinloch v. Savage*, 1 Spear's Ch. 471. The following case shows with how much pains the parties will be ascertained, if it is possible, from the writing. The agent of the defendant, the seller, wrote an order for rice in a memorandum of the plaintiff's. The order did not give the buyer's name further than the following note to the order: "This order is to be executed if Mr. Allen" (the plaintiff, the buyer) "does not hear from Bennet" (the defendant, the seller) "from Liverpool by Saturday." The order was signed by W., as the defendant's agent, and the defendant wrote a letter to W., affirming the transaction, and mentioning the plaintiff as the buyer. Two

other separate orders for tobacco were given in the same form, except that there was no note as above, and the defendant as to them wrote no letter. As to the latter's orders, the plaintiff wrote affirming them. It was held that the Statute of Frauds was satisfied, citing *Champion v. Plummer*, *semble* even as to the two orders for tobacco; the agent's signature, taken with the plaintiff's letter, being, *semble*, sufficient. *Semble*, also, that as the orders were all given and entered in the book at the same time as the defendant's letter, the latter, though it spoke specifically only of the rice, might be deemed to refer to the whole sale; *Allen v. Bennet*, 3 Taunt. 175. Where S. conveyed land to the plaintiff, the defendant, and Ba. in consideration of their paying a debt, he, S., owed H. on a note made by S. and endorsed by the plaintiff, and this note was renewed by another note, on which were the plaintiff, the defendant, and Ba., it was held that on paying the

The following memoranda were together held to be sufficient: "Fifty-eight acres, etc., lives of Isaac Finnamore, aged, etc. etc., at 12s. per acre from first of May, etc.," written by the defendant who wrote a letter as follows: "I request you to give Mr. Powell" (the plaintiff claiming under the Finnamores) "the article from me to Thomas Finnamore, about the Quarry Hill Farm, that he may get the leases drawn." (q)

§ 403. Among the examples already given are one or two cases in which the memorandum was executed by an agent, and it is proper to call attention to this feature of the writing. Without again opening the discussion had elsewhere of the general law of agency as affected by the Statute of Frauds, a few decisions touching the proof of the parties to the contract will now be referred to, where, for instance, a broker drew a sold note: "Sold for Mr. Edward Higginbotham to my principal," and Higginbotham was the defendant's agent, who had no business or capital of his own, and though the defendant traded, the latter was held liable. (r) So where the defendant addressed a letter to G., acknowledging his liability for the debt of one W., the plaintiffs were allowed to show that the debt due by W. was due to them, and that the defendant's letter was addressed to G. in the latter's character as their solicitor. (s) So where the plaintiff, owner of goods, authorized T. & M., brokers, to sell them for him, and T. & M. negotiated a sale with the defendants (whose undisclosed principal was one S.); the latter signed, as brokers, a note, "Sold for" T. & M. "to our principal" (not naming him), and delivered this to T. & M., who also, as brokers, signed a note, "sold to Dale, etc." (the defendant), "for account of, etc., Humphrey" (the plaintiff), it was held that evidence

latter note the plaintiff could have contribution from the defendant, the Statute of Frauds being satisfied by the first note, to which the defendant was a party; *Boulden v. Scircle*, 34 Ind. 64; see, above, *Sarl v. Bourdillon*, as a case where two writings were

taken together; and *infra*, *Newell v. Radford*.

(q) *Powell v. Dillon*, 2 B. & Beatt. 420.

(r) *Trueman v. Loder*, 11 A. & Ell. 594.

(s) *Bateman v. Phillips*, 15 East, 272.

of usage that the defendants were liable as they did not disclose their principal, was admissible, notwithstanding the Statute of Frauds.(*t*) Memoranda which show the defendants, the vendors, to be solicitors, have been held sufficient to charge them.(*u*) Where an agent of the defendant wrote in the plaintiff Newell's book, "Mr. Newell, 32 sacks, etc., culasses, at," etc., and signed this, parol evidence of usage was admitted to explain the items which described the subject-matter, and it was held that the parties sufficiently appeared.(*v*) So an entry by a broker, in the regular course of his business, giving, among other things, the names of both parties connected by the word "to" is sufficient.(*w*) The memoranda made at public sales being, as has been seen, sustained when even so meagre as scarcely to show the contract require to be noticed while dealing with the present point. Two or three examples will speak for themselves. Where a memorandum stated a purchase as "through" so and so, "auctioneers," the vendors are sufficiently shown, as the principals need not be disclosed.(*x*) Where the auctioneer made the following entry: "Hagadorn" (the defendant); "terms of sale" (giving them): "On St. Marks Place, price and buildings" (describing them); then "1 lot cor. Ave. A, etc. etc.; 1 lot next adjoining . . . Pinckney" (the plaintiff, "\$1410;" it was held that the parties sufficiently appeared.(*y*) A sheriff's memorandum as follows was sufficient, viz., "Partition lands, Louis Roberts *v.* B. T. Adams; lot 11, etc. etc., Louis Roberts," and giving the price.(*z*)

§ 404. There is a well established exception to the rule that the memorandum under the Statute must show the parties, and that is the case of open guar-
Open guar-
anties.
anties, such as recommendations of financial responsibility,

(*t*) *Dale v. Humfrey*, E. B. & Ell. 1004 (Exch. Chamb. affirming the Queen's Bench by a divided court, three judges dissenting).
 once which also showed the names of the parties).

(*u*) *Dobell v. Hutchinson*, 3 A. & Ell. 371.
 (*w*) *Coddington v. Gray*, 16 Gray, 436.

(*v*) *Newell v. Radford*, L. R. 3 C. P. 95.
 (*x*) *Walsh v. Barton*, 24 Ohio St. 39.
 (*y*) *Pinckney v. Hagadorn*, 1 Duer,

52 (there was a subsequent correspond-
 (*z*) *Wiley v. Roberts*, 27 Mo. 390.

letters of credit, etc. etc.(a) The defendant, being debtor to the plaintiff, delivered the latter a note for \$100, made by one J. McG., payable to the defendant or the bearer; on the back of this the defendant wrote, "In consideration of one hundred dollars I guarantee the payment of the within note;" it was held that the omission to name the person to whom guaranty was addressed was not fatal, *semble*, that the guaranty being to bearer meant to any bearer.(b) And even an order for goods addressed to no one in particular was held to become a sufficient memorandum by being delivered and accepted by a particular person.(c) But it may be questioned whether the rule should be extended beyond the class of cases first given when usage and necessity prevent the obligee from being named. The following offer passed by the board of commissioners of the defendant county, viz.: "The board also orders that said county auditors issue to each volunteer sworn, enlisted, etc., into the service of the United States, etc. etc., to the extent of Marion County's quota, and for which Marion County shall have all and full credit, an order for the sum of one hundred dollars out of the county treasury," etc., is not in writing under the Statute relating to the limitation of actions because only one of the parties thereto appears therein.(d)

§ 405. The following are some examples of memoranda held to be insufficient because not describing the parties to the contract. Thus, an instrument of trust is fatally defective in not naming the *cestui que trust*.(e) A memorandum which does not show whether the defendant takes as vendee, or as agent, mortgagee,

Examples of insufficient memoranda; not showing the parties, generally.

(a) Brettell v. Williams, 4 Exch. 628; Griffin v. Rembert, 2 Rich., N. S. 414; Thomas v. Dodge, 8 Mich. 54; Duval v. Trask, 12 Mass. 156; Birkhead v. Brown, 5 Hill, 634; Tarbell v. Stevens, 7 Iowa, 166; see below; see, however, in Williams v. Byrnes, 1 Moo. P. C., N. S. 154, the opinion by Stephen, C. J.; Pollock's Princ. Cont. (1st Am. ed.) p. 186.

(b) Palmer v. Baker, 23 U. C. C. P. 306, citing cases; see Manning v. Mills, 12 U. C. Q. B. 578.

(c) Darby v. Pettee, 2 Duer, 149, citing Union Bank v. Goster; see § 416.

(d) Marion Co. v. Shipley, 14 Cent. L. J. 112, S. C. Ind., citing Grafton v. Cummings; Kalamazoo, etc., Manufact. Works v. Macallister, 40 Mich. 84; Baker v. Johnson Co., 33 Iowa, 151; Kinsey v. Louisa Co., 37 Ia. 438; Overshiner v. Jones, 66 Ind. 452; Sithin v. Board of Comm., 66 Ind. 109, overruled.

(e) Dillaye v. Greenough, 45 N. Y. 445.

etc., is insufficient.(f) So a memorandum certifying that the defendant became security, and in what amount,(g) but not stating to whom. An offer to take a lease by the intending lessee, and attested by the lessor's agent, but not naming the lessor otherwise than as "Sir," was followed by an acceptance in the handwriting of the agent, addressed to and received by the intending lessees, but not naming the lessor, and not signed by the lessees, is not a sufficient memorandum, so as to allow the lessor to compel specific performance. The Master of the Rolls reluctantly allowed the objection of the Statute of Frauds.(h) The following are some examples of memoranda made to evidence a public sale, but held insufficient because not indicating the parties to the agreement. Thus an entry by the sheriff to the effect that he had sold the lands of the defendant in the execution to the amount of the demand.(i) So where the name of the purchaser is not connected, even by a caption with the memorandum.(j) A sale of land was had

(f) *James v. Muir*, 33 Mich. 226. Where one memorandum was, "I agree to pay, etc., Abram Falk," and was signed Abram Falk, and the other gave Falleck as the name of the payee, and was signed by Sutphin, and there were other contradictions and blunders, it was held that the Statute of Frauds was not complied with. *Calkins v. Falk*, 1 Abb. App. Dec. 292.

(g) *Hoffman v. Larue*, Penning. 685; (County of) *Huron v. Kerr*, 3 Grant, Ch. 267. A memorandum as follows: "By this present I give ample and sufficient power to Don Jose de Jesus Noe to use or dispose of my lot, which I hold or have granted, as may seem best to him," does not show the parties to the contract; *Stafford v. Lick*, 10 Cal. 16; see *Backhouse v. Hall*, 6 B. & S., for a memorandum held insufficient under an act which required that where a guaranty is given to a firm, and that firm changes, the intention to be bound to the new firm, should appear in writing.

(h) *Williams v. Jordan*, 6 Ch. D. 517; 46 L. J. Ch. 681; 26 W. R., 230.

(i) *Jackson d. Gratz v. Catlin*, 2 Johns. 259.

(j) *Gill v. Bicknell*, 2 Cush. 358; where Warrin, the defendant, employed N., auctioneer, as agent, to sell his land, and in the auctioneer's book called "diary," was an entry that the sale of the land was to be made on a certain day on account, "J. Warrin," etc., while in a salesbook was the advertisement, the bids, and purchasers' names, together with the entry, "5251, Chas. McQuade, 190,380" (nothing in this was said as to the seller), and the terms did not give the vendor's or auctioneer's names; a memorandum at the foot of the terms, signed by the plaintiff, stated the purchase to be from N., the auctioneer. It was held that the Statute was not complied with, though there was a receipt of the deposit of ten per cent., which designated the lots by their numbers, expressed the purchase-money, and stated that "the title is to be given by J.

under the following circumstances: the only reference to any vendor was that the sale was "to close the estate of the late J. M. Thompson," and directing persons wishing, to make inquiries to "J. W. Weeks, administrator," or "S. H. Cummings." Endorsed on the advertisement was "A. R. Walker, auctioneer, and agent for both parties," and the defendant signed a paper acknowledging the sale, but in this no vendor was mentioned. The defendant's attorney wrote the plaintiff: "I find Mrs. Thompson is much attached to the place;" the purchase-money to be made in this way, . . S. H. Cummings, $\frac{3}{10}$: \$27,000; Mrs. Thompson, $\frac{1}{10}$: \$9000," etc. etc., giving other names. And these were held insufficient memoranda under the Statute of Frauds as not showing a vendor. Walker's endorsement was insufficient, and showed that he was not vendor; the allusion in the advertisement to Weeks and Cummings did not indicate that either of them was vendor, and the attorney's letters showed Cummings as a vendee, not a vendor.^(k) Where on the cover of plaintiff's (Nicholls) book was written "James Nicholls' memorandum of Philo Baldwin's property received by assignment," and where inside was "a list of property charged on schedule as Philo Baldwin's," and on another page was a list of auction sales described as such, following which was "Philo Baldwin's right in Donald Baldwin's estate, John Johnson, \$60." It was held that the vendor not being named, the plaintiff could not hold Johnson to his purchase.^(l) Where the defendant executed a memorandum as follows, "D. Spooner agrees to buy the, etc., lots of marble purchased by Mr. Vanderbergh (the seller and plaintiff), now lying, at, etc., at 1s. per foot," and the plaintiff executed the

Warrin and others." This was signed "Albert H. Nicolay, auctioneer, by J. McLoughlin," who was proved to have been a clerk, but who was not present at the sale; *McQuade v. Warrin*, 12 N. Y. Leg. Obs. 251.

(k) *Grafton v. Cummings*, 99 U. S. 106. The following memoranda were held insufficient, because it was impossible to say which lot was sold to which man, whether the preceding or the

succeeding, and because, as to some lots, no names at all of purchasers were attached. "No. 11, \$142.25; No. 54, \$133 per acre, John Springer; No. 11, \$100.6 $\frac{1}{4}$, Daniel Wilcoxson; No. 13, \$176 $\frac{1}{4}$, Col. Masterson; No. 14, \$11, etc., Col. Masterson; No. 54, \$2.26 per acre. *Carmack v. Masterson*, 3 Stew. & Porter, 413.

(l) *Nicholls v. Johnson*, 10 Conn. 198.

following: "Mr. J. Vandenberg agrees to sell to Mr. D. Spooner his several lots of marble purchased by him, now lying at Lynne, at 1s. the cubic foot, and a bill at one month." The first writing said nothing as to this last stipulation, and *semble* because the notes differed, the question came up whether the first was sufficient, and it was held not to be, because Vandenberg was spoken of only in describing the goods, and it was not said that the defendant agreed to buy from him.(m) A memorandum made by an auctioneer, stating that certain real estate once belonging to a certain person (naming him) had been sold to one Parish, was insufficient for not stating the vendor's name at all, and that of the vendee imperfectly.(n)

§ 406. The following are examples of broker's memoranda insufficient as not giving the parties: "Of North & Co., 30 mats, etc.," signed by the agent of North & Co., the plaintiffs.(o) Some examples have already been given of open written contracts, addressed to all the world, regarded as valid under the Statute of Frauds, though of course they did not name the obligee, but there has been some difference of opinion on the point, and the Privy Council of Great Britain doubted whether an advertisement addressed to the public, as one offering a reward, was sufficient under the Statute of

Other examples of insufficient memoranda; broker's memoranda, etc. etc.; description of the parties.

(m) *Vandenberg v. Spooner*, L. R. 1 Exch. 319, thought by Willes, J., in *Newell v. Radford*, *infra*, to be an extreme case, and one difficult to understand. The following memorandum showed neither the vendor nor the vendee nor the price:—

Adrian & Vollers. "Sale at the Court-house.
"Mayer Property" (describing it), . . . \$6000
"Bal. in 6 mos., * * *
"Possession, etc., Oct. 1, etc.; note to bear interest."

\$146.00.

Adrian & Vollers were sought to be charged as purchasers. *Mayer v. Adrian*, 77 N. Car. 84.

(n) *Champlin v. Parish*, 11 Paige, 408.

(o) *Graham v. Musson*, 7 Scott, 776; 5 Bingh. N. R., 606; so even, though the memorandum was in the handwriting of the defendant; *Graham v. Fretwell*, 4 Sc. N. R. 25; 3 M. & G., 368. Where a broker bought for the defendant two lots out of a cargo, each lot belonging to different owners, one of the owners being the plaintiff, and the broker delivered each owner a sold note, executed in his, the broker's, name, and not naming the buyer, and to the buyer a bought note, not naming the seller; the notes were held to be insufficient under the Statute of Frauds; the court seemed to have thought the notes variant; *Fisenden v. Levy*, 11 W. R. 258.

Frauds.(p) The case before the court was that of a written promise addressed to H., and by him handed over to the plaintiff, who carried out the contract.(q) The authority followed in the case last given was more in the nature of an open offer, for the paper read, "Sir, I beg to inform you," etc., and was addressed to no one; the memorandum was, however, never intended for the public, but was handed to one to be given another, though in fact it was delivered to W. O., who gave it to the plaintiff; the Statute of Frauds was held to apply.(r) An order by a board of county commissioners, offering bounty to volunteers for the military reserve of the United States, was held insufficient, because one party only, *i. e.*, the board, appeared in the memorandum.(s) Where a guaranty intended for one is delivered by mistake to another, the latter cannot sue;(t) nor can two sue on a written guaranty addressed to one of them.(u) Where the plaintiff forbore his claim, as a workman, against one L., because of the following promise made L. by the defendant: "In relation to your workmen's pay have no fear, they shall be paid for all their labor in shoes sent to, yours truly, J. J. Henry." It was held that the memorandum could not be sued upon by the plaintiff, as it does not evidence any contract in which he is concerned.(v) It is sometimes a question how fully the name of a party to the contract must be given. Thus, it was doubted whether it was sufficient description to say "one Parish;"(w) and the misstatement of the Christian name is ordinarily fatal.(x) Omitting the second initial of a name is not material however.(y) The name entered in his own order book by the agent

(p) *Williams v. Byrnes*, *infra* (the judges saying that none of the decided cases of advertisement of a reward raise the question of the Statute); see *Kurtz v. Cummings*, 24 Pa. St. 37; see § 404.

(q) *Williams v. Byrnes*, 1 Moore, P. C., N. S. 193; 8 L. T., N. S. 69; 11 W. R., 487; 9 Jur., N. S. 363, citing *Williams v. Lake*.

(r) *Williams v. Lake*, 2 E. & E. 354; 1 L. T., N. S. 57 (Mellish, J., in *Catling v. King*, *infra*, said that this case should never have been reported).

(s) *Marion Co. v. Shipley*, 14 Cent. L. J. 112, S. C. Ind., citing analogous cases.

(t) *Grant v. Naylor*, 4 Cranch (U. S. S. C.), 224.

(u) *Allison v. Rutledge*, 5 Yerg. 194.

(v) *Lang v. Henry*, 54 N. H. 59.

(w) *Champlin v. Parish*, 11 Paige, Ch. 408.

(x) *McGavney v. The State*, 20 Ohio, 98, citing *Grant v. Naylor*.

(y) *Fessenden v. Mussey*, 11 Cushing, 127.

of the other party, as "Mr. Newell," is sufficient.^(z) A memorandum signed "E. C.," and addressed to "M. A.," is sufficient, the pleadings admitting the identity of the parties.^(a)

§ 407. The last point to be discussed under the subject of the parties to be named in the memorandum is how far a designation or description will answer as a substitute for a name. Where the principals to a sale made by brokers are named in the bought note, though only described in the sold note, it is sufficient.^(b) Certain agents, on behalf of Lord Barrington, the defendant, signed a memorandum, endorsed on a printed particular of sale, whereby Lord Barrington acknowledged himself to have bought the property described in such particular for a certain sum, and that he had paid so much, and bound himself to complete the purchase according to the within conditions; certain other persons, auctioneers, subjoined to this memorandum the following: "As agents for the vendors we confirm this sale and acknowledge the receipt of the deposit." The printed particular of sale described the property, and stated that it belonged to the late Admiral F., and that the sale was by direction of the executors. Romilly, M. R., held the Statute of Frauds to be satisfied.^(c) In a later case, also at the Rolls, a memorandum of sale, written on the conditions of sale and referring to these described the land, and referred to certain particulars contained in another document. The vendees' names were given, but not the vendors'; the vendees were described as "We, S. N. Scott and R. D. Warne, do hereby acknowledge that I have, etc., purchased," etc., signed by Scott, acting for himself and Warne; one E. C., signed "as agent for vendors, I hereby confirm this sale." The conditions of sale showed that the vendors were in possession, and were a company; and Jessel, M. R., held that it appearing that the plaintiffs were a company, and were in possession of the land, and that E. C. was their agent, they could recover on above memorandum, being sufficiently described therein for the Statute of Frauds

The parties described by a designation, as vendors.

(z) *Newell v. Radford*, L. R. 3 C. P. 54.

(a) *Chichester v. Cobb*, 14 L. T., N. S. 433.

(b) *Cropper v. Cook*, L. R. 3 C. P. 200.

(c) *Hood v. Lord Barrington*, L. R. 6 Eq. 221.

to be satisfied.(d) In another case the conditions of sale stated the vendors to be "trustees," but their names were not given in the conditions or the memorandum of sale endorsed thereon; vendors' names, however, appeared at the head of the abstract of title, and the purchaser's requisitions were headed, "Bourdillon to Collins" (the names of the parties), and specific performance was decreed.(e) Where the memorandum described

(d) *Commins v. Scott*, L. R. 20 Eq. 16, citing *Potter v. Duffield*, and *Morris v. Wilson*.

In an equity case on the present point there was a demurrer to a bill for specific performance, which showed the following facts, namely, that the plaintiff, Beer, being desirous of buying certain leaseholds from the defendant, the Hotel Company, P., his agent, wrote to the secretary of the company making an offer of £2000 for the interest of the latter; he afterwards made a new offer of £2500 in a letter to the defendant's solicitors; the latter sent for P.'s signature a memorandum written on back of conditions of sale; this provided for the delivery by vendors of an abstract of title, including an agreement between Beer of the one part, and company of the other. The bill stated that the word "vendors" in the conditions, etc., of sale meant the London etc., Hotel, Company, who were in fact the vendors; that P., for plaintiff, signed the memorandum; that the defendants' solicitors afterwards sent P. the conditions of sale with the memorandum thereon. B. was the authorized agent of the defendants; that the contract was a fair one; that at a previous auction £2500 had been the defendants' reserve price; that the defendants' business was buying and selling and dealing with hotels, houses, etc. It was held that the memorandum was sufficient under the Statute of Frauds; and that, taken with the allegation, it appeared from the memorandum who

were the vendors, namely, the defendants; and that their authorized agent was B., who signed; that the signature of B. was sufficient under 37th section, sub-section 2, of act 1867, relating to companies; *semble*, that an auctioneer can make a memorandum for an undisclosed vendor to satisfy the Statute of Frauds; *Beer v. London and Paris Hotel Co.*, L. R. 20 Eq. 420.

Morgan, the plaintiff, to whom a lease of a quarry was about to be made, signed a memorandum, signed by both parties, agreeing, "on behalf of himself and all parties interested," to sell, etc., the stone quarry, etc., and Worthington to buy, "the lease agreed by the lessor to be granted as said R. Worthington" (the defendant) "may direct." It was held that this was sufficient to pass whatever interest Morgan had, as he undertook to ascertain the title; *Morgan v. Worthington*, 38 L. T., N. S. 445.

(e) *Bourdillon v. Collins*, 24 L. T., N. S. 345.

Where the complainant in a suit for specific performance had signed a contract of purchase written on the conditions of sale, and the only description of the vendor was in one of the conditions which described him as a trustee acting under a trust for sale, it was held sufficient, as the trust must be created by some instrument in writing that would show it; *James, L. J.*, thought that "a trustee," "master of such an estate," "possessor of such a title," enough. But *Mellish, L. J.*,

the vendor as “legal personal representative” of L. D., and in fact he was not so at the time of the sale, though the first person entitled to become so, and became afterwards what he had claimed to be, the memorandum was sufficient; the doubt raised by parol could be explained by parol.^(f) In a case in the United States where a plaintiff, the executor of one Anderson, acting as clerk at his own sale, made this memorandum, “Sale-bill of the estate of John Anderson, deceased, etc. etc., bought by A. Carroll” (the defendant), “it was held that the writing did not show the vendor, nor even that the sale was on the plaintiff’s account as executor.^(g) Thus far the rulings seem plain; but there remains for consideration some cases of greater difficulty which leave the law in an altogether contradictory state. The *dicta* just quoted, from *Catling v. King*, show the dispute.

In the first of the cases which has given rise to this variety of views the conditions of sale of land stated that it was by “direction of the proprietor;” and the agreement of purchase, giving the price and terms, was endorsed on the conditions of sale, and signed by the purchaser and auctioneer; the conditions and particulars of sale described the property, and Jessel, M. R., said, “The question is, can you find out from the memorandum who the vendor is? The property is stated to be put up for sale ‘by direction of the proprietor,’ therefore the proprietor is the vendor, and is referred to as being the person who employs the auctioneer to sell. What more do you want? It is said that the term proprietor is not a sufficient description; I think that it is an excellent description; certainly in acts of Parliament the proprietor or owner is frequently mentioned as the person on whom notices are to be served, and the like.”^(h) In another decision by the same judge in the

thought “vendor” or “my client” insufficient. If there were two trustees authorized by different instruments to sell the same land, it would be a case of latent ambiguity; *Catling v. King*, 5 Ch. D. 660; 46 L. J., N. S., Ch. 384; 36 L. T., N. S. 526; 25 W. R., 551.

^(f) *Towle v. Topham*, 37 L. T., N. S. 309.

^(g) *Carroll v. Powell*, 48 Ala. 302.

^(h) *Sale v. Lambert*, L. R. 18 Eq. 3; in *Catling v. King* Sir George Jessel said, that he thought the report of *Sale v. Lambert* incorrect, inasmuch as the papers sent in showed the vendor as described to be the “owner in fee simple in possession free from encumbrance,” etc.

same volume, the particulars of sale of land at auction spoke of "vendor" sometimes, or "vendors," not naming them; and the vendee signed an agreement reciting a part payment to the auctioneer, and binding himself to pay the balance but not saying to whom; the auctioneer wrote and signed "confirmed on behalf of vendor;" the defendant denied that he was the vendor; the memorandum was held insufficient as not showing the vendor. Jessel, M. R., said that he had lately decided that "proprietor" was enough, but that he now held that "vendor" was not; the evidence left it in great doubt whether the defendant was vendor or not, and a bill by the vendee for specific performance was dismissed.⁽ⁱ⁾ In a late case Sir George Jessel, the Master of the Rolls, said: "The auctioneer only says, 'We are instructed to dispose of property; our instructions are to sell.' That does not show that the person who is selling is the owner or proprietor, which is the same thing. He may be a person having a power to dispose of the property, or what is sometimes called a power simply collateral, without any interest in the property. The most familiar case is the case of a trustee with a power of sale. He may be a mortgagee or any person having a power; in fact, he may be a commissioner under an Inclosure Act, having power to sell the land to pay for the inclosure, or a commissioner under the Drainage Act, having power to sell the lands for payment of the waste. He does not show by anything who he is or what he is, therefore there is no description given at all. The mere word 'vendor' will not do, because that is the somebody who sells. When you come to 'proprietor,' there is something to show it, and I do not know why 'proprietor' in many cases is not as good and better than the name of the person. An auctioneer might say, 'We will sell on behalf of John Smith.' That is not such a good description as, 'We sell on behalf of the owner of Blackacre, situate so and so.' In some cases the description is better than the name. Would any body doubt that the words, 'the queen,' or 'the prime minister,' or 'the president of the council,' would not in-

(i) *Potter v. Duffield*, L. R. 18 Eq. 7; 43 L. J. Ch., 472; 22 W. R., 585.

dicare known persons? You do not want the actual baptismal and surnames; you only want a sufficient description. In every case the question of what is sufficient may be discussed, but where there is no description, as in the case before us, it is different. Here it is alleged that we must get that by referring to a letter which was written in which some reference was made to the license, and it is said if the party had looked at the license he would have found the person named who was the person selling. Even the license does not state it as the vendor; it says it is Mrs. Donnison, but it does not say she is the vendor.”(j) The House of Lords has sustained the Master of the Rolls in his estimate of the meaning of the word “proprietors,” and held it a sufficient description of a party to a contract to satisfy the Statute of Frauds.(k) In a common law case which went off on another point, Mellor, J., and Quain, J., doubted whether either “vendor” or “proprietor” was sufficient.(l) In a recent case in chancery Judge Fry thought the descriptions, “owner, mortgagee, or proprietor,” were sufficient; but not those of “my client, my friend, my principal.”(m) In California it has been decided that the broker may recover his commissions, though the memorandum of agreement describes the defendant as “owner.”(n)

To sum up this controversy, it may be said that where a description points directly to one set of persons and but one, and their identity can be shown from the writing or from other written evidence, or by parol evidence which can indicate the persons described in the writing without involving

(j) *Donnison v. People's Café Co.*, 45 L. T., N. S. 189; see a criticism of this case, 16 Ir. L. T., 41; 69 Law Times, 224; see *Wilmot v. Stalker*, 2 Can. Law Times, 254; 18 Can. L. J., 178, Ch. D. U. C.; *Buxton v. Bellin*, 3 Vict. L. R. Eq. 243, to the effect that “vendor” is an insufficient description.

(k) *Rossiter v. Miller*, L. R. 3 App. Cases, 1129; 48 L. J. Ch., 10; 39 L. T., N. S. Rep., 173; 24 Moak, 712 (note). (See Table of Cases.)

(l) *Thomas v. Brown*, L. R. 1 Q. B.

D. 720; 45 L. J. Q. B., 814; 35 L. J., N. S. 237; 18 Moak, 152 (note), saying that *Sale v. Lambert and Potter v. Duffield* were inconsistent.

(m) *Shardlow v. Cotterill*, 44 L. T., N. S. Rep. 549, citing *Rossiter v. Miller* (especially Lord Cairns's opinion in *Dom. Proc.*), *Sale v. Lambert*, and *Potter v. Duffield*; see as to *Shardlow v. Cotterill*, 69 L. T. 224; 16 Ir. L. T., 41.

(n) *Condee v. Barton*, 10 Pac. C. L. J. 333, 62 Cal. 1; see *McCarthy v. Loupe*, id. 562.

inadmissible oral proof of anything in the contract itself, the writing is sufficient under the Statute of Frauds. It is agreed that the word "vendor" is not such a description, because to ascertain him there must be parol evidence to show not only that there exists a certain person, but also that he entered upon a certain contract which is that set forth in the writing; since, without proof that he made the contract, he is not shown to be the vendor. To say in a contract of sale that a rule requiring both parties to be designated is satisfied by describing one of them only as seller, would be an absurdity, since in such a contract where one buys, the other party must be a seller, whether he is called so or not. So far there can scarcely be disagreement, but whether "owner" or "proprietor," is the same as "vendor" or not has been the difficulty. If no one but the owner or proprietor can be the vendor, Judge Mellor and Judge Quain were right in their doubts. One may, however, contract with an agent, who as yet unauthorized relies upon a ratification, or with one who contracts to sell what he hopes to get, as is done every day in the Stock or the Corn Exchange, and it is the purpose of such laws as the Statute of Frauds to leave no opening for a doubt whether the vendee is agreeing for property or moonshine. Where, further, the vendor can himself only have obtained what, as "owner," he undertakes to sell, through possessing in his own favor such evidence of title as the Statute of Frauds permits, or by being invested with the property by an act of law, such as descent, etc., then in endeavoring to learn who is meant by the "owner," we must go to other evidence equally valid as the writing we start with, or fail altogether to identify who is meant by "owner;" in the latter case the memorandum fails to establish a contract, and no violation of the Statute takes place. The reasoning in *Catling v. King*, as to the force in this connection of the word "trustee," applies equally well to the word "owner," and might perhaps be safely extended, for one can as little become owner of property, except by a writing, by oral evidence as sanctioned by the Statute, or by an act of the law, as one can become trustee in any other way. So far as the Statute is concerned, oral evidence permitted by it, as, for example, parol proof of earnest paid or of the delivery

and acceptance of chattels, or parol proof of such contracts as those to which it makes no reference, is of equal force with a writing. And, therefore—to put an imaginary case—under a memorandum in which the unnamed owner of a chattel contracts as “owner,” in, say, a contract signed by his agent to sell it, it would appear to be no violation of the Statute of Frauds for the plaintiff to produce evidence that A. B., under a verbal contract of previous sale, accepted the chattel in question, which was delivered to him by his vendor, and that, therefore, he, A. B., is the “owner” referred to in the memorandum. No proof is adduced but such as is either required or allowed by the Statute of Frauds. Whether it is expedient to extend the rule of *Sale v. Lambert* to contracts relating to personalty is a different question, and as to it no opinion is here intended to be expressed. Before leaving the subject of what is such a sufficient description of the parties as that it is not necessary to have given their names, there are two or three American cases to be noted. A promise to one to pay his “workmen” was held an insufficient designation, and parol evidence offered by the plaintiff to show that he was one of the promisee’s workmen was rejected.^(o) But under a statute similar to the Statute of Frauds, a promissory note drawn to the order of those persons who should be appointed trustees by a certain convention was sustained.^(p) So a memorandum written by the cashier of a bank which said, “Forward me the past due note, etc., of, etc., and I will pay it,” was held to bind the bank.^(q) In the note will be found authorities which furnish examples of memoranda regarded as sufficient or insufficient in their description of the parties to the contract.^(r)

(o) *Lang v. Henry*, 54 N. H. 59.

(p) *Caples v. Branham*, 20 Mo. 247.

(q) *May v. National Bank of Malone*, 9 Hun, 111.

(r) Sufficient: *Linton v. Williams*, 25 Ga. 391; *McConnell v. Brillhart*, 17 Ill. 360; *Brown v. Whipple*, 58 N. H. 229. Insufficient: *Stowell v. Has-*

let, 5 Lans. 385; *Barry v. Law*, 1 Cranch, C. C. 77; *Dilworth v. Bostwick*, 1 Sweeny, 582; *Hope v. Dixon*, 22 Grant, 442; *Klinitz v. Surry*, 5 Esp. 267; *Wheeler v. Collier, M. & Malk.* 123; *Wilmot v. Stalker*, 2 Can. Law Times, 254, Ch. D. U. C.

CHAPTER XVIII.

THE CONTENTS OF THE MEMORANDUM—THE SUBJECT-MATTER OF THE CONTRACT—THE PRICE.

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| <p>§ 408. Subject-matter of the contract generally; oral evidence to apply description.</p> <p>§ 409. General examples of sufficient description of the subject-matter (land); description by the nature of the interest.</p> <p>§ 410. Subject-matter ascertained by reference to other writings; description by name of land, by situation, etc. etc.</p> <p>§ 411. Insufficient memorandum generally; description by the interest in the land.</p> | <p>§ 412. Description of land by name or situation.</p> <p>§ 413. Memoranda sufficiently describing the subject-matter (personalty).</p> <p>§ 414. Memoranda insufficiently describing the subject-matter (personalty).</p> <p>§ 415. Memoranda sufficiently describing the subject-matter (choses in action); insufficient description.</p> <p>§ 416. Oral evidence to apply the writing to its subject.</p> <p>§ 417. The price.</p> <p>§ 418. Examples.</p> <p>§ 419. The general rule questioned.</p> |
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§ 408. THE memorandum to comply with the Statute must indicate the subject-matter of the contract,^(a) which must so clearly be shown as to admit of identification and separation.^(b) In order to justify a decree for specific performance the memorandum must describe and identify the particular lot or tract of land, or must with certainty furnish the means of identifying it;^(c) or, as was said in another case, the writing must in itself identify its subject by reference to something

Subject-matter of the contract generally; oral evidence to apply description.

(a) *Noyes v. Stauff*, 5 Oregon, 458; 13 Rich. Eq. 250; *Wheelan v. Sullivan*, 102 Mass. 206; *Ayres v. Gallup*, 44 Mich. 13; see 11 U. S. Dig. F. S., p. 845 et seq.; see § 426.

(b) *Madeira v. Hopkins*, 12 B. Mon. 604; *Pulse v. Miller*, 81 Ind. 190.

(c) *Parrish v. Koons*, 1 Pars. Eq. Cases, 94, citing a number of cases.

outside of it, by resorting to which certainty may be attained;(*d*) and even if the Statute of Frauds is not set up, the court may refuse specific performance, because unable to discover the contract sufficiently to make a decree.(*e*) The identification must be, it has been said, without recourse to oral evidence;(*f*) but this broad statement needs to be qualified by the distinction that “where a sufficient description is given parol evidence must be resorted to in order to fit the description to the thing; but where an insufficient description is given, or where there is no description, such evidence is inadmissible.”(*g*) The evidence is admissible to construe and apply a description, not to show what was intended to be expressed.(*h*) Speaking of the cases on the subject the Supreme Court of Michigan in a recent case said they agreed in this, that it is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid needless when the writing comes to be applied to the subject-matter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that with the assistance of external evidence, the description, without being contracted or added to, can be connected with and applied to the very property intended, and to the exclusion of all other property.

The circumstance that in any case a conflict arises in the outside evidence cannot be allowed the force of proof that the written description is in itself insufficient to satisfy the Statute. Whether the description answers the requirement of the Statute is a question which occurs on the face of the papers, and is naturally preliminary to the introduction of testimony to connect the contract with the property, and the decision of it would regularly seem to be required on an inspection of the documents, and before the arrival of opportunity for any con-

(*d*) *Fisher v. Kuhn*, 54 Miss. 483.

(*e*) *Hudson v. King*, 2 Heisk. 571.

(*f*) *Miller v. Campbell*, 52 Ind. 127.

(*g*) *Murdock v. Anderson*, 4 Jones's Eq. 77; see *Pulse v. Miller*, 81 Ind. 190.

(*h*) *McGuire v. Stevens*, 42 Miss. 724;

Scarritt v. St. John's M. E. Church, 7

Mo. App. 178; see *Skinner v. M'Doual*,

2 De G. & Sm. 264; 17 L. J. Ch. 347;

Wills v. Ross, 77 Ind. 1; *McCorry v.*

King, 3 Humphr. 267.

flict of the kind referred to. Moreover, it would hardly be deemed reasonable to allow the validity of the written description to depend on the ability of a party to bring about a conflict in the outside testimony.(i) Sir George Jessel, in a recent case, said that no memoranda or maps or the like will prevent the necessity of recurring to oral evidence to ascertain the subject-matter of the contract.(j) It has been held that the mis-description or non-description must be gross.(k) The omission from a deed of a description of the land is fatal, and cannot be helped by parol;(l) nor is oral evidence admissible to supply a defect in the statement of the subject-matter in a written contract relating to land.(m) In one or two cases equitable part performance has been given great force in excusing defective descriptions of the subject-matter. Thus, where the defendant wrote, "Whereas William Pattison and John Allan have been at very large expenses in both their farms, . . . I desire that they may not be raised in their rents, etc. etc., as I have promised this order should be given by me as not willing to grant them leases, . . . as I know full well the rent would not be paid for some years. I hope this will be duly observed by those in possession." The Lord Chancellor Thurlow said that this was manifestly an agreement to grant some kind of interest which is not expressed, in consideration of certain improvements to be made upon the farm, and he directed that a master ascertain what lease would be equivalent to the value of the improvements less the enjoyment which the defendant had already had.(n) It

(i) *Eggleston v. Wagner*, 46 Mich. 610, citing cases.

(j) *Shardlow v. Cotterill*, L. R. 20 Ch. Div. 90; 51 L. J. Ch., 353, C. A., reversing *Kay, J.*, 18 Ch. Div. 280; 50 L. J. Ch., 613.

(k) *Hooper v. Laney*, 39 Ala. 338.

(l) *Pargond v. Pace*, 10 La. Ann. 615; so of a mortgage; *Keiffer v. Starn*, 27 id. 282.

(m) *Ripley v. Page*, 12 Vt. 355; see *Brown v. Berry*, 6 Coldw. 102.

(n) *Allan v. Bower*, 3 Bro. C. C. 150 (the note of a case supplied by Sir

Samuel Romilly to Lord Colchester); see Lord Redesdale's criticism upon this case in *Clinan v. Cooke*. Where Miller, the owner of the legal title, gave Antle, an alleged *cestui que trust*, who occupied the land, a receipt for the purchase-money, "paid for land," the court said that if the Statute of Frauds applied to the case, "the receipts for money 'for land,' shown to be the land in contest, fortified by the admission by the personal representative of the knowledge and personal duties of Miller, constitute a sufficient memorial,"

was suggested in a Massachusetts case that the words "the land" were sufficient, and this though the case showed no part performance. The suit was for use and occupation, and the defence was that the land had been sold to the defendant, who relied on a promissory note given by the plaintiff to him, and on which was endorsed, "N. B. This note to be given up when I give him a deed of the land which I have engaged to give him." The defendant had previously paid the plaintiff an amount the same as that stated in the note. The defence was held to be sufficient, and it was said that, even in a suit for specific performance, the memorandum might have been sufficient.^(o) Where the description is sufficient, a misunderstanding by the defendant, who knew what he was buying, is not a defence to a bill for specific performance.^(p.)

§ 409. To find a logical order under which to classify the numerous decisions in which the sufficiency of the statement of the subject-matter of the contract has been drawn in question is almost impossible. The

General ex-
amples of
sufficient

and that even infant heirs are bound; *Miller v. Antle*, 2 Bush, 409.

And where a memorandum stated that the parties thereto had "swapped farms," it was held that possession taken of one farm, coupled with willingness of the owner of the other to deliver it, made the want of a description of the land immaterial; *Overstreet v. Rice*, 4 Bush, 3.

Where the vendee's title-bond described the land as "ten acres," etc., "adjoining him" (the vendee) "on the north," and the ten acres were "laid off" to him, and he took and kept possession for a long period, the designation was considered to be sufficient; *Hanley v. Blackford*, 1 Dana, 1.

Under the Civil Code of Louisiana the quantity of land passing by a conveyance may be shown by the possession taken thereunder, when the conveyance itself does not show; *Purl v. Miles*, 9 La. Ann. 270.

(o) *Little v. Pearson*, 7 Pick. 301.

A written contract provided for the building of several houses all alike and of equal value, and that one of the parties was to have one not especially designated, the court on parol evidence would indicate a house and enforce the contract; *Ellis v. Burden*, 1 Ala. 466.

Where the parties were partners who, on making a settlement, agreed that the plaintiff should bring into the settlement the land he owned in Union township (county of, etc., state of, etc.), provided that the number of acres brought into the settlement by the defendant shall not exceed those brought in by the plaintiff, and the latter owned 200 acres, it was held that the defendants could select 200 acres of their land, and that the memorandum was sufficiently definite; *Carpenter v. Lookhart*, 1 Carter, 440.

(p) *Nene Valley Drainage Commissioners v. Dunkley*, 4 Ch. D. 1.

description
of the sub-
ject-matter
(land) ;
description
by the nature
of the
interest.

cases of Realty and of Personalty will call for a separate consideration, and a further division, into sufficient and insufficient memoranda, will make a simple arrangement. Under these last heads an arbitrary cataloguing into groups of such descriptions as, in fact, are most commonly found, seems the best that can be done. A usual way of identification is for a contracting party to refer to property as *my* or *his* land, etc., followed by a general reference to the locality. Thus, "My lot on the flat in the town of South Bend, etc., on the river bank," is sufficient ;(q) or, "All my interest in the southwest quarter," etc., giving section, county, state, etc. ;(r) or, "A certain farm in Ashby, commonly called, etc., which farm was bought by me," etc. ;(s) or, "Said land is all that piece bought of Rose by Thomas Smith ;"(t) or, "My house and lot," giving the town, county, and state ; the vendor having but one house, etc., in that place, is a sufficient description in a deed ;(u) or a memorandum which describes the property to be a certain town lot, that the title stood in the name of a certain third person, but admitting that the property belonged to the plaintiff ;(v) or, where giving a full description of a certain section, the writing stated the subject of the contract to be "all my interest" therein, "said quarter section being the property at this time of William Torr, Sr.," etc. (w) B.'s "right" in C.'s "estate" is a sufficient description. (x) Where a memorandum uses the phrase "freehold equities," a list of houses, in which

(q) *Colerick v. Hooper*, 3 Ind. 318.

(r) *Torr v. Torr*, 20 Ind. 122.

(s) *Bird v. Richardson*, 8 Pick. 252.

(t) *Smith's Appeal*, 69 Pa. St. 474.

"Tract of land I bought of James and Charles McCartney, lying in Green County," is a sufficient description in a devise, and oral evidence is admissible to apply it. *McCorry v. King*, 3 Humph. 267.

(u) *Carson v. Ray*, 7 Jones, Law, 610 ; see *Phillips v. Hooker*, Phillips, Eq. 193.

(v) *Packard v. Putnam*, 57 N. H. 50.

(w) *Torr v. Torr*, 20 Ind. 122. *Jane*

Jacob, a vendor, wrote, through her solicitor : "I have closed with Mr. Waldron for this place ; you will kindly arrange or draw deed, so that I may get out of my responsibility to Mr. B.," etc. (*semble* the writer's landlord). This was written from the premises in suit. Parol evidence was admitted to show what was meant by "this place," and the interest meant was interpreted to be Jane Jacob's whole interest, which was that of a tenant. *Waldron v. Jacob*, 5 Ir. Rep. Eq. 131.

(x) *Nichols v. Johnson*, 10 Conn.

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the person referred to in the memorandum had an equity of redemption, may be admitted to explain the above phrase.(y) Where the question was as to the proof of a certain alleged new lease, made by the lessor to his previous lessee, and a receipt was given for a payment which was at the increased rate of the new lease, and which was described as "balance" of rent due, and under the old lease there was no rent due, while under the new lease a third party was to pay part and the plaintiff the rest, *semble* this sufficiently described the interest.(z) It has even been held that a description in a sheriff's return is sufficient which reads, "Sold the tract in the name of . . . Massey to Hyskill," containing 300 acres, etc. ;(a) or where, after a vague geographical description, the writing particularized the land as that which the writer had formerly bought of the vendee, etc.(b) A description of land as the "property purchased at four hundred and twenty pounds at the Sun Inn," etc., is sufficient; see § 350 ;(c) or a description of the lands held by the defendant in a certain county and state, by virtue of his marriage with so-and-so.(d) The land "whereon the

(y) *Roots v. Snelling*, 48 L. T. 216.

(z) *Nunn v. Fabian*, L. R. 1 Ch. App. 35; 35 L. J. Ch., 141.

(a) *Hyskill v. Given*, 7 S. & R. 371; see *Thomas v. Blackemore*, 5 Yerg. 127 (which was a sheriff's return of all a certain tenant's interest in certain land).

(b) *Atwood v. Cobb*, 16 Pick. 230.

(c) *Shardlow v. Cotterill*, L. R. 20 Ch. Div. 90; 51 L. J. Ch., 353, C. A., reversing *Kay, J.*, in 18 Ch. D. 280; 50 L. J. Ch., 613; 44 L. T. Rep., N. S. 549. The Master of the Rolls thought that the receipt alone was sufficient, but taking the other memorandum, was much strengthened. The rule of sufficiency of description is the same under section 4 as under section 5 (Wills); and "property purchased at a certain place, of which a certain person was owner," would certainly be enough in a devise, and "property" is not as vague as "vendor." The

only word used in a statutory assignment by a debtor for the benefit of his creditors is "property." *Baggallay, L. J.*, cited *Bleakley v. Smith and Ogilvie v. Foljambe*. *Lush, J.*, noted that the memorandum used the word "transfer," indicating that personalty was not meant, and that a day was fixed for giving up possession, which also indicated realty.

(d) *Higdon v. Thomas*, 1 H. & G. 145. Where the defendant, under date of August 30th wrote, "I cannot sell at your offer, but I am in a strait, as I see no way to pay my note this fall, and in order to do it I will sell enough at the contract price to pay it, or I will give 2000 acres for my notes, you to select in 80 acre lots;" and the defendant's pleadings admitted an offer on August 26th by the plaintiff to pay the defendant \$20,000 for the land, which offer was refused. The letter of August 30th, taken with the pleadings,

vendor resides" is sufficiently described.(e) There is, indeed, a class of cases where the principal, if not the only means of identifying the property contracted for, is the description of the interest therein which the person contracting has held. Thus, where a soldier entitled to land under a resolution of the legislature wrote on the back of his discharge from military service that A. B. was entitled to all the lands to which he, the soldier, was entitled from the state, etc.:(f) it is true that the interest was held not to be one within the Statute of Frauds; or generally contracts, which affect, not specially a certain tract, but all the right, title, and interest of a person in any property. Thus where a father wrote, speaking of his daughter, "She shall be entitled to share in whatever property, etc.," the description was considered sufficient, and as meaning her share as a child under the law.(g) So a return by a sheriff of the sale of all a man's right, title, and interest in certain lands, describing them, is sufficient; the interest being a leasehold.(h) Where a sale was advertised to be for account of R., and the defendant having elicited in the testimony what R.'s interest was, viz., a share of the proceeds of the land sold upon certain conditions, cannot object that a writing is being impeached by parol.(i) The following is sufficient:—

"Received of James Henderson three hundred dollars in part payment of a certain tract of land, being my own head-right, lying on Rusk Creek, in the cross-timbers, this 23d March, 1859.

"ISRAEL EARLES."(j)

was held to show what lands were meant, namely, those which the plaintiff had proposed buying; Washburn v. Fletcher, 42 Wis. 170.

(e) Simmons v. Spruill, 3 Jones's Eq. 9.

Where a memorandum stated an agreement by the defendant to take the plaintiff into partnership in a certain lot, in the city of Jackson, in consideration of the plaintiff's paying \$165, etc. It was held that the de-

scription must refer to the lot for the purchase of which the plaintiff advanced the money, and the answer to the bill showed that this was the particular lot; Connell v. Mulligan, 13 Sm. & Mar. 390.

(f) Fisher v. Fields, 10 Johns. 495.

(g) Laver v. Fielder, 32 Beav. 5.

(h) Thomas v. Blackemore, 5 Yerg. 127.

(i) Briggs v. Munchon, 56 Mo. 470.

(j) Fulton v. Robinson, 55 Tex. 404.

The doubt sometimes is not what property is meant, but the interest therein intended to be passed. Thus, the words, "The title of H. Morgan and all other parties interested in the assigning of such lease to be accepted," and the statement in the bill that the defendant had accepted the title, show sufficiently the interest sold to bind a demurring defendant.^(k) It has been held that a memorandum which does not state the time from which a lease agreed upon is to run is good, as the date will be assumed to be that of the memorandum.^(l) But, on the contrary, in Ireland a memorandum of contract of lease not giving the date of the beginning of the term was held insufficient; the term will not be assumed to run from the date of the memorandum.^(m)

§ 410. As has just been seen, the subject-matter, like any other part of a contract, can be shown by taking together two or more writings. So a statement in a bill in equity of a willingness to assume the encumbrance on certain land is a sufficient description for a reference to the writings, evidencing the encumbrance will disclose the latter.⁽ⁿ⁾ So, also, a memorandum as follows is sufficient: "I have this day sold the house, etc., in Newport, to J. Owen,

Subject-matter ascertained by reference to other writings; description by name of the land; by situation, etc. etc.

(k) *Morgan v. Worthington*, 38 L. T., N. S. 445; see *Inge v. Birmingham*, etc., R. W., 3 De G. M. & G. 664, for a doubt as to the interest contracted for.

Where a broker having no interest in the property gave a written promise to give a lease of a certain tavern, naming it, "subject to my being able to obtain the lease," it is, *semble*, enough, for what the lease was might be shown by parol evidence; and where one memorandum spoke of the lease and "everything," and a previous paper described the lease, "fixtures, and utensils, etc.," the two together satisfy the Statute of Frauds; *Horsey v. Graham*, L. R. 5 C. P. 13.

(l) *Jaques v. Millar*, 6 Ch. Div. 155; 37 L. T., N. S. 151; 47 L. J. Ch., 544; 25 W. R., 847, relying on *Doe v. Benja-*

min, and distinguishing *Blore v. Sutton* as a peculiar case; and the report does not show whether the memorandum bore the date it was actually signed; and *Cartwright v. Miller and Nesham v. Selby* as a case where repairs were agreed upon, so that the date of the lease could not well be the time from which the term was to begin.

(m) *Wyse v. Russell*, L. R. Irel. 11 Ch. D. 176, citing *Marshall v. Berridge*, as overruling *Jaques v. Millar*; and *Blore v. Sutton*, was shown to be a case where there was a date for the beginning of the lease stated in the memorandum; see *Carroll v. Williams*, 1 Ont. 153.

(n) *Ives v. Hazard*, 4 R. I. 14; see *Schmeling v. Knisel*, 45 Wis. 328.

for, etc., . . . as soon as the deeds can be had from Mr. Deere," as a reference to the latter would show what house was meant.(o) Where the property has a name, a reference to it by such name is enough.(p) A description of the land by its contiguity to other properties is good, especially where the metes and bounds are all given, and the measurements start from and call for well-known marks.(q) A description of lands as being in such a county, containing so many acres, and adjoining lands of A., B., and C., is sufficient.(r) So a description of land as a half section, contiguous to that owned by the person to whom the memorandum was addressed.(s) So a written promise as follows: "I will give John Sampson one hundred acres, etc., next to either Stokely or Newell . . . or I will give him the two hundred acres."(t) The location of a property as being in a certain town may be definite enough,(u) and it is not necessary to give the county and state if these are otherwise ascertainable.(v) A description, "Three houses

(o) *Owen v. Thomas*, 3 M. & Kee. 353 (the defendant, moreover, by declining an inquiry before a master, waived the uncertainty, if any).

(p) *Godwin v. Francis*, L. R. 5 C. P. 295 (the Liddington estate); *Crooks v. Davis*, 6 Grant (Can.), 319 (Runymede estate); *Powell v. Dillon*, 2 B. & Beat. 416 ("the Quarry or Hill farm"); *Naylor v. Goddall*, 26 W. R. 162; 37 L. T., N. S. 422; 47 L. J. Ch., 55; and *Horsey v. Graham*, *supra* (naming taverns by their name); *McMurray v. Spicer*, 16 W. R. 332 ("the mill property," etc., in a certain village); *Barry v. Coombe*, 1 Peters, 651 ("your $\frac{1}{2}$ E. B. wharf," etc.); *Mizell v. Burnett*, 4 Jones, 252 ("Watling tract on the Roanoke River"); *Farris v. Carpenter*, 1 Head. 608 ("The Peter tract"); *Simmons v. Spruill*, 3 Jones, Eq. 9 (the land "whereon the vendor resides," or the so-and-so farm); *Bird v. Richardson*, 8 Pick. 252 ("certain farm situated in Ashby, commonly called

the Waters farm"); *Ross v. Baker*, 72 Pa. St. 189 ("Fleming farm on French Creek").

(q) *Ryan v. Hall*, 13 Metc. (Mass.) 521; *Pinckney v. Hagadorn*, 1 Duer. 95; *Hooper v. Laney*, 39 Ala. 338.

(r) *Shaver v. Shoemaker*, Phill. Eq. 327.

(s) *McConnell v. Brillhart*, 17 Ill. 362.

(t) *Simpson v. Breckenridge*, 32 Pa. St. 290. "All that piece, etc., of land notified hereunder, being a portion of Crown allotment, 9 sect. 82, Parish, of Puebla County grant, according as it is now fenced by George Cunningham," with a rough map attached, was thought to be insufficient, that is to say, a person from it could not locate the land. *Cunningham v. Gundry*, 2 Vict. L. R. Eq. 200.

(u) *Packard v. Putnam*, 57 N. H. 50; *Carson v. Ray*, 7 Jones, Law, 610; *McMurray v. Spicer*, 16 W. R. 332.

(v) *Briggs v. Munchon*, 56 Mo. 470.

in the town of Revere, two are French roof," is sufficient.(w) The failure to name the town is not necessarily fatal to the sufficiency of the description; and where a receipt, dated at Chicago, recited the money to have been given in part payment of certain lots of land, giving their number and the number of the block they were in, parol evidence was admitted to show that the land was situated in a certain addition to Chicago.(x) Where the town is named besides, there is still less doubt.(y) And where a memorandum was executed at Boston, and described the land as a house on Church Street, and parol evidence showed that there was no Church Street in Boston, but that there was in Somerville, and that the writer of the memorandum owned one house in the latter place in Church Street, the description was held to be sufficient.(z) And generally a description by a street is enough,(a) especially where no latent ambiguity exists.(b) Designating a lot by its number may be sufficient, through reference to a plan;(c) and, as has been seen, the number of the lots, and of the block in which they lie, may be enough, without showing the town where they are situate.(d) A reference to the description of the land in the public records is sufficient, as by its number or designation in a list or plat of town lots; or by the county, township, section, or part of a section,(e) as shown by the survey of the state;(f) and a reference to land by its designation

(w) Slater v. Smith, 117 Mass. 98.

(x) Fowler v. Redican, 52 Ill. 408.

(y) Winslow v. Cooper, 104 Ill. 242; Eppich v. Clifford, 4 Col. L. Rep. 97; 17 Cent. L. J., 380; 6 Col. 493.

(z) Mead v. Parker, 115 Mass. 414, citing Hurley v. Brown, *infra* (some of the court dissenting). Whether a memorandum, "I propose my house on Eighth Street, subject to \$2000, for one house on Delaware Avenue, and one farm in Fairfax County, Va., and \$575 in cash," signed by both parties, is sufficient, was not decided in Bigelow v. Armes, 5 Morr. Trans. 79.

(a) Hurley v. Brown, 98 Mass. 545 ("Amity Street, Lynn, Mass."); Scanlan v. Geddes, 112 Mass. 15; Slater v.

Smith, 117 Mass. 98; Bleakley v. Smith, 11 Sim. 150; Hammer v. McEldowney, 46 Pa. St. 334; Hand v. Grant, 5 Sm. & M. 508 ("lots 4 and 5 in square on south of Main Street," etc.).

(b) Hurley v. Brown; Scanlan v. Geddes, *supra*. See Carson v. Ray; Phillips v. Hooker.

(c) Scarlett v. Stein, 40 Md. 528.

(d) Fowler v. Redican, *supra*.

(e) Higdon v. Thomas, 1 H. & G. 145; Bourland v. Peoria, 16 Ill. 542; Colerick v. Hooper, 3 Ind. 318; Fugate v. Hansford, 3 Litt. 262; McWilliam v. Lawless, 17 No. West. Rep. 349, S. C. Neb.

(f) Torr v. Torr, 20 Ind. 122; Newton v. Bronson, 13 N. Y. 593.

in the Land Office,(g) even when the land is such as the grantor is entitled to receive from the state as a citizen, and which has yet to be ascertained from the Land Office and located.(h)

§ 411. So much for the sufficient memoranda; those insufficient admit of mainly the same grouping. First, those where a description of the subject-matter may be said not to be given at all, as where a paper describes certain persons as being the assignees of the vendor, but does not state what is assigned;(i) or the receipt for the purchase-money of land not describing it;(j) or a description in the return of a fi. fa. which does not indicate the land.(k) A description, though attempted, may be too vague; as to lease all the water necessary for a canal, or to convey such land as might be necessary;(l) or "terms for letting and taking coals;"(m) or a return by a sheriff that he had sold lands of the defendant to the amount of the demand against the latter;(n) or putting down one's name on a subscription-list for "a lot to build on;"(o) or "tract of land" to so-and-so at such a price;(p) or a memorandum of the sale of a number of houses which does not give the number.(q) In the note will be found a few additional cases on the present point.(r) A partial description is insufficient, as where a written offer refers to the defendant's one-half of a mill, but not the other half;(s) or where the writing omits a lot which parol evidence shows belongs to the block

(g) Robinson v. Garth, 6 Ala. 208.

(m) Price v. Griffiths, 1 De M. & G.

(h) Peters v. Phillips, 19 Tex. 74; 83.

see Fisher v. Fields, 10 Johns. 495, supra.

(n) Jackson d. Gratz v. Catlin, 2 Johns. 259.

(i) Parker v. Bodley, 4 Bibb. 102.

(o) Church v. Farrow, 7 Rich. Eq. 378.

(j) Patterson v. Underwood, 29 Ind. 607; Welsh v. Bayaud, 21 N. J. Eq. 186; Murdock v. Bain, 4 Jones's Eq. 77; Ellis v. Deadman's Heirs, 4 Bibb. 467.

(p) Meadows v. Meadows, 3 McCord, 460.

(k) Thomas v. Turvey, 1 H. & G. 438; see, on the general point of inadequacy of description, Smith v. Arnold, 5 Mason, 417.

(q) Seagood v. Meale, Prec. Ch. 560.
(r) Dilworth v. Bostwick, 1 Sweeny, 586; Blair v. Snodgrass, 1 Sneed, 25; Evans v. Ashley, 8 Mo. 177; Parrish v. Koons, 1 Pars. Eq. Cas. 95.

(l) State v. Baum, 6 Ohio, 387.

(s) Love v. Neilson, 1 Jones's Eq. 339.

in suit.(t) So a description which gives rise to a latent ambiguity, as “a tract of about three acres” in a certain township, county, and state, where the evidence showed that the party had other lands in the township.(u) So an erroneous description, as one stating the property situate in a corner of the public square, and the property was not either in or adjoining the square.(v) A memorandum which refers to the property as “my lot” is insufficient; though, as has been seen, such a means of identification, taken with other points of description, may be enough.(w) “Your interest in the real and personal estate” is insufficient description, and oral evidence is inadmissible under the Statute of Frauds to show that the interest was that of the plaintiffs, in the estate of the deceased father of the plaintiffs, and of the defendants.(x) A bill for money due on “property sold,” and receipt for money paid “on lot of ground formerly occupied by A. J. Ward,” are insufficient, though the payer and receiver of the money were named in both memoranda, and were the same persons;(y) and whether or not the property can be ascertained by a description of the interest which some persons hold in it is enough or not, the interest or title intended to be transferred by the contract must clearly appear.(z)

Where a receipt recited the payment by Florence, the defendant’s testator, “for the purchase of the property at the corner of, etc., now in his occupancy, and sold by me to him,” and another receipt, both being signed by the plaintiff’s ancestor, read “on account of purchase of building 17th St. and Penna. Ave.,” and the signer of the receipts had only a half interest, it was held that the writings were insufficient in not ascertaining what land was sold, whether the portion occupied by Florence or the whole lot, and were therefore not valid proof under the Statute of Frauds to prove a verbal agreement with

(t) *Coles v. Bowne*, 10 Paige Ch. 535. *supra*; *Holms v. Johnston*, 12 Heisk. 158.

(u) *Troup v. Troup*, 6 W. N. Cas. (Phila.) 90. (x) *Dickinson v. Rawson*, 12 N. Y. Week. Dig. 536 (S. C. N. Y.).

(v) *Baldwin v. Kerlin*, 46 Ind. 428. (y) *Fisher v. Kuhn*, 54 Miss. 483,

(w) *Stafford v. Lick*, 10 Cal. 16; see citing *Holmes v. Evans*, etc.

(z) *Seagood v. Meale*, Prec. Ch. 560.

the plaintiff's ancestor to buy either his interest or the whole lot.(a) All the farm "in Pompey in the tenure and occupation" of the defendant is an insufficient description.(b) Where the word "take" was used it would be inferred that a fee simple was intended,(c) but where the writing shows that the parties contemplated a lease which they fail to describe, the evidence is insufficient.(d) In a similar case the court said: "Nor do I think I can spell out from the memorandum itself what term was intended. The word take in the purchase of a fee simple estate may mean a purchase of all the vendor's interest, but it is clear that the memorandum in this case contemplates a lease. I am not then helped by the word take, for I should still have to make out whether the same lives or different lives, or a long term of years, was intended."(e) Where a receipt read, "Received of W. Dolling the sum of . . . as part of purchase-money of £390 of four cottages, Nos. 23, etc., . . . the lease and counterpart to be paid for by Mr. Dolling," said Wood, V. C., "the agreement stated in the bill is so nearly a perfect agreement that I regret that I cannot give effect to it. It defines the property to be sold and the price to be paid for it, and if nothing had been said about the interest to be taken by the purchaser the Statute would have been satisfied, for the law would then have implied that the whole interest of the vendor was contracted for. Unfortunately, I find the words, 'the lease and counterpart to be paid for by Mr. Dolling.' It is plain therefore that the agreement is not for a conveyance or an assignment of the defendant's whole interest, but for an under-lease. Indeed the contract stated in the bill is for the entire term, 'less a reversion of a few days,' but how many days? No doubt it is the practice in these cases to give the purchaser the entire term, less two or three days, and the number reserved is not really a matter of great consequence. But I cannot take account of such a practice in order

(a) *Williams v. Morris*, 95 U. S. S. C. 454. regarded as implying a fee in the vendor.

(b) *Simonds v. Catlin*, 2 Cai. 61.

(d) *Riddick v. Glennon*, 6 Ir. Jur.

(c) See, however, *Johnson v. Kellogg*, 7 Heisk. 264, where a general agreement to convey was apparently not

(Cases), p. 39; see *Hurley v. Brown*, 98 Mass. 545.

(e) *Reese v. Reese*, 41 Md. 559.

to help out a defective agreement.(f) So a memorandum of sale of "the whole property" is not sufficient where the real subject of the agreement was a leasehold interest.(g) Letters negotiating for a lease did not indicate the term further than by agreeing to do as other tenants of the lessor, and as the lessor had leases of various duration, the memorandum was held insufficient.(h) A memorandum of lease not stating the term or duration of the latter is insufficient, and cannot be eked out by parol.(i) An agreement in writing as follows, "have agreed to let, lease, and give possession" of certain premises, is an insufficient memorandum, under the Statute of Frauds, to prove a contract to give the unexpired part of a term held by the promissor; as a contract of lease it is insufficient, as not stating the duration of the term, and as proof of the assignment of an existing lease it is not admissible, the wording being inconsistent with that contention.(j) So a memorandum of lease not describing the rent.(k) So, it was formerly held as to one not stating the date of beginning of

(f) *Dolling v. Evans*, 36 L. J. Ch. 474.

(g) *Farwell v. Mather*, 10 Allen, 322 (*secus*, *semble*, had a fee simple been intended).

The defendant wrote as follows: "Mr. Middleton agrees to pay £625 for the cottage and stable, Mr. Cox paying the expenses of the lease held by Mr. Smith," signed "H. Middleton." *Kindersley*, V. C., said that if the memorandum had said nothing about the lease then the law would have assumed the interest to be in fee, if the party has such an interest, if not for whatever interest he may have; the vendee, if ignorant of what interest the vendor has, and the latter, having less than a fee, has an option to take the lesser interest, or to be free of the contract. But here, assuming that "the lease" means not a lease then held by the vendor, but the lease to be granted under the contract, how long a lease

is meant, or if the whole lease held by Cox, the plaintiff, under what covenants? The pleadings showed that an assignment of the whole lease held by Cox was not meant, and the memorandum is insufficient under the Statute of Frauds. The rule is different where the contract is for the interest, more or less, which the vendor has to give, and one who has contracted for a fee can if he chooses take less; if the interest is not described in the memorandum, or some particular subsisting interest referred to, the Statute of Frauds is not satisfied; *Cox v. Middleton*, 2 Drew. 216.

(h) *Gordon v. Trevelyan*, 1 Price, 69.

(i) *Parker v. Tainter*, 123 Mass. 186; *Hodges v. Howard*, 5 R. I. 158.

(j) *Gardner v. Hazleton*, 121 Mass. 495, citing *Farwell v. Mather* and other cases.

(k) *Hodges v. Howard*, *supra*.

the lease; the court will not infer that the latter date is the same as that of the contract.^(l) Where the land was not described in the memorandum, and did not belong to the vendor, the Statute of Frauds is not satisfied.^(m)

§ 412. While, as has been seen, a description of land by some name given it is generally sufficient, it is not always so; thus, "all that property known as the Union Hotel property," was held an insufficient description because it was found impossible to ascertain what was meant to be included, without resorting to parol evidence.⁽ⁿ⁾ So the words "Vale of Neath Colliery" are not sufficient to describe the plant and fixtures.^(o) A description as "tract of land called Declined Range, etc., adjoining the turnpike road near where Woodward now lives," is insufficient.^(p) Where the evidence was an imperfect memorandum, and the sketch of a survey of the land not sufficiently connected, the court said: "But even if I were to look at the agreement and this sketch, it is impossible therefrom to define the land the subject of the contract. Oral testimony must still be adduced to show the particulars as to size and position, without which the sketch is not intelligible. What the lots were would therefore be ascertained virtually by parol in the face of the Statute of Frauds."^(q) A reservation out of a larger tract is insufficient, though it gives the number of acres, if it does not locate them precisely.^(r) So where land described by the acreage is referred to as being next a certain other tract, the description may not be sufficient.^(s) While a reference to the property as that situate in a certain town, county,

(l) *Cartwright v. Miller*, 36 L. T., N. S. 399; *Blore v. Sutton*, 3 Mer. 245; but see *Jaques v. Millar*, *supra*.

(m) *Ayres v. Gallup*, 44 Mich. 13.

(n) *King v. Wood*, 7 Mo. 401.

(o) *Vale of Neath Colliery Co. v. Furness*, 45 L. J. Ch. 278; see, however, *Brown v. Berry*, 6 Coldw. 102.

(p) *Dorsey v. Wayman*, 6 Gill, 65.

(q) *Stretton v. Stretton*, 24 Grant, 20.

(r) *Wright v. Cobb*, 5 Sneed, 144; *Sheid v. Stamps*, 2 Sneed, 175.

(s) *Force v. Dutcher*, 18 N. J. Eq. 402; *Allen v. Chambers*, 4 Ired. Eq. 125 ("a certain tract of land lying on Flat River, including Taylor Hick's spring-house, and lot adjoining land of Lewis," etc.); *Clark v. Chamberlin*, 112 Mass. 19 (the memorandum showed that part of a tract was sold, but did not show what part).

etc., is generally sufficient, it is not always so.^(t) “His tract of land in district No. 7, one mile south of Trenton,” was held to be an insufficient description.^(u) All the farm “in Pompey in the tenure and occupation” of the defendant is an insufficient description.^(v) A description of land by the quarter section, without giving township or range, is insufficient.^(w) So a description, “West half of lot 15 of my sub-division,” is insufficient.^(x) And the omission of the county or state is fatal, if the rest of description is not clearly indicative.^(y) A description by reference to the situation on a certain street may not be enough.^(z) An extreme case was that in which a description of property as being at the corner of certain streets in a certain city, was held insufficient, because it did not state which corner.^(a) A description by the number of the tract is not always sufficient, as where there is no plan giving a location,^(b) and see the cases given in the note.^(c) The cases given in the note below are examples of property absolutely without a description of location;^(d) as was said in one of them the land might be anywhere on the globe.^(e) A written offer to sell eighty-seven acres which are situated somewhere is not sufficient to satisfy the Statute of Frauds.^(f) “One ice-house

(*t*) *Murdock v. Anderson*, 4 Jones, Eq. 77 (“one house and lot in the town of,” etc); *Miller v. Campbell*, 52 Ind. 127 (“one hundred and twenty acres in Shannon County,” etc.); *Capps v. Holt*, 5 Jones, Eq. 155 (“a tract of . . . acres lying on Watery Branch, in Johnston County”); *Allen v. Chambers*, 4 Ired. Eq. 125 (“certain tract lying on Flat River . . . and 200 acres in Person County”).

(*u*) *Biggs v. Johnson*, 2 L. & Eq. Reporter, 587 (S. C. Tenn.).

(*v*) *Simonds v. Catlin*, 2 Cai. 61.

(*w*) *Johnson v. Craig*, 21 Ark. 538.

(*x*) *Holms v. Johnston*, 12 Heisk 158 (county and state not being given).

(*y*) *Johnson v. Kellogg*, 7 Heisk. 264.

(*z*) *Hope v. Dixon*, 22 Grant (Can.), 442 (though giving the frontage on the street and the depth).

(*a*) *Holmes v. Evans*, 48 Miss. 247.

(*b*) *Clark v. Chamberlin*, 112 Mass. 19.

(*c*) *Adams v. Scales*, 1 Baxt. 337; *Bonner v. Baker*, 8 La. Ann. 284; *Hudson v. King*, 2 Heisk. 571; *Freeport v. Bartol*, 3 Greenl. 345 (a pew described as No. 13, B. Bartol, \$86, etc.).

(*d*) *Eargood's Estate*, 1 Pearson, 400; *Williams v. Threlkeld*, 2 Cranch C. C. 307; *Carr v. Passaic, etc., Company*, 4 C. E. Green, 425.

(*e*) *Rollins v. Pickett*, 2 Hill, 552 (distinguishing *Fish v. Hubbard*, which was thought an extreme case).

(*f*) *Campbell v. Taul*, 3 Yerg.

and lot.”(g) “So and so debtor for 4 loads and one lot \$125.”(h) A farm on which is situated a grist-mill, saw-mill, etc., said farm containing “so many” acres.(i) *Quære*, whether a memorandum as follows: “A certain lot of land containing about eleven acres, to be measured, for nine hundred dollars per acre, I to have the present crop,” was sufficient, though parol evidence made it perfectly clear what land was meant.(j) So a description of a tract as part of a larger tract;(k) or where the memorandum does not show whether the whole of a lot of land is meant or only a portion;(l) or contiguous to some other tract, without identifying the first tract thus spoken of.(m) A description by a location yet to be made is insufficient, as, by way of analogy, where a written agreement to convey 26,000 to 28,000 feet on certain streets, when the bounds are fixed and the streets laid, was held too indefinite to be specifically enforced by a court having power to specifically enforce the written contract of a decedent; the bounds not having been fixed or the streets laid out in the lifetime of the latter.(n) So a memorandum giving a certain interest in all the land the promissor may be able to reserve is sufficient.(o) With the exception of the question of the admissibility of parol evidence to apply the writing to its subject-matter, all the points as to realty have been considered, and, before taking up the cases relating to personalty, it may be well to say that the contradiction between the different rulings which have been cited will, upon close examination, be found to be not so great as it seems; a description which in one case would point to nothing definite, would in another identify the property admitted by the parties, or known to the court to be that in controversy, while collateral evidence of the circumstances surrounding the transaction, or of the possession or doings of

(g) *Pipkin v. James*, 1 *Humphr.* 326. Ala. 355; *Coleman v. Manhattan Beach Co.*, 14 *N. Y. Week. Dig.* 323; *Beekman v. Fletcher*, 48 *Mich.* 572.

(i) *Taney v. Bachtell*, 9 *Gill*, 210.

(j) *Ives v. Armstrong*, 5 *R. I.* 595.

(k) *Wright v. Cobb*, 5 *Sneed*, 144; 7 *Mo. App.* 178 (“lot adjoining”).

Sheid v. Stamps, 2 *Sneed*, 175.

(n) *Lynes v. Hayden*, 119 *Mass.* 483.

(l) *Williams v. Morris*, 95 *U. S. S. C.* 454; see *Jenkins v. Harrison*, 66

(o) *Webster v. Gray*, 37 *Mich.* 39.

the parties, might cause a most general description to attach immediately to a precise property, and in this connection an examination of the admissibility of oral evidence to apply the description to its subject will be of value. See § 426.

§ 413. While the same rules apply to personalty as those which have been given in the preceding sections, the cases, as a rule, show a somewhat greater latitude of interpretation. The following are some examples of written contracts relating to personalty which were regarded as adequately describing the subject-matter. Where there was a contract by letter for purchase of "your wool," accepted by a letter of the vendor, parol evidence is admissible to show that the wool was partly that of the vendor and partly some he could acquire through his neighbors, Lord Campbell, holding that the Statute of Frauds did not apply, said: "I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received for the purpose of showing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract." There was parol proof which indicated that one of the parties intimated that, in his own opinion, the wool amounted to a given quantity; it turned out afterwards to be of a greater quantity; a tender of the latter was held good. In the Exchequer Chamber, Byles, J., thought it a case of latent ambiguity.^(p) Where the memorandum was as follows: "Mr. Newell, 32

Memo-
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alty).

(p) *Macdonald v. Longbottom*, 1 E. & E. 983; 28 L. J. Q. B., 299; and above, in *Seacc. Cam.*, 2 L. T., N. S. 609; 29 L. J. Q. B., 256.

The defendant wrote in a book a statement of contract of sale to him of certain hops, which memorandum he handed to the plaintiff's agent for signature, who accordingly signed; the same day the defendant wrote the plaintiffs to deliver "the 27 pockets, Playsted and 4 pockets Selmes, 1836, Sussex," to a third party; this description accorded with that in his book, where the hops were thus de-

scribed, not being called hops, and the memorandum was held to be sufficient. Abinger, C. B., doubted whether the letter sufficiently identified the contract so as to have been sufficient if the original memorandum had been insufficient. Parke, B., thought the letter would have been insufficient. Bolland, B., was inclined to think that it would have been sufficient. The fact that the hops were not described as such, but were called "Playsted," "Sussex," etc., was not commented on; *Johnson v. Dodgson*, 2 M. & W. 653.

sack cullasses at 39s., 280 lbs.," etc., oral evidence of the trade of the parties was admitted to show that the one being a baker and the other a flour dealer, a sale of flour was meant; there was also a correspondence between the parties which indicated the nature of their business.(q) Where the defendant wrote the plaintiff, speaking of "the boxes which I bought of you at ten shillings," and requesting the plaintiff to deliver them to a certain third party, "as also the fine black," the memorandum was regarded as sufficient.(r) A memorandum which does not give the size and weight, as of bales of cotton, is not therefore insufficient, average size and weight being presumed.(s) *Semble*, that where "this hemp" is spoken of parol evidence is admissible to identify a particular lot, though the writing does not specify the quantity.(t) The case in the note, whose syllabus is given at length, is an example of the care with which the meaning of the memoranda made to comply with the Statute of Frauds is sought to be discovered.(u)

(q) *Newell v. Radford*, L. R. 3 C. P. 54; see *Coddington v. Goddard*, 16 Gray, 436.

Where an entry of a sale of chattels was "three cases Booth & Co. gin, Terry, \$5.25, etc.," it was held that it could be orally shown that the parties would understand this; *Coate v. Terry*, 24 U. C. C. P. 573, relying on *Newell v. Radford*.

(r) *Thompson v. Menck*, 2 Keyes, 82; 22 How. Pr. 431; 4 Abb. Dec., 403, citing *McKnight v. Dunlop*.

(s) *Penniman v. Hartshorn*, 13 Mass. 90.

(t) *Sale v. Darragh*, 2 Hilton, 196.

(u) *Symes v. Hutley*, 2 L.T., N.S. 509; where plaintiff wrote to defendant: "I have bought 100 cheese, thirty of which are very fine; 80 lbs. a cheese. The remainder are not so large. On receipt of your order I will forward sample. Defendant replied: You may send me six Cheddar cheese as a sample. Plaintiff sent six, with a letter saying:

I was obliged to change one of the cheese. Defendant afterwards wrote: If remainder are as good as sample, you may send me thirty more; you may also send a sample of the smaller ones, and say the lowest price for cash. The plaintiff replied: Your favor to hand; I will send the cheese to-morrow; I could not say, less than 78s.; they ought to be 80s. The plaintiff then forwarded to defendant twelve larger cheeses and six smaller ones, which defendant refused to accept, as he said, on account of badness of quality. It was held that he was bound to accept the twelve larger ones, but not the six smaller ones, as a contract for the larger ones did not mean thirty absolutely, but as many of the lot of thirty as were of the same quality as the samples previously sent; and as the six smaller ones were sent as samples merely, which the defendant was not bound to keep." The whole thirty could not have been meant, as the de-

§ 414. The following are examples of memoranda containing insufficient descriptions of personalty sold: So and So, “debtor for four loads and one lot;”(v) “F. Ogden & Co., — Bailey, etc., Brown, 12—1.2; White, 16—1-4, 60, etc., days;”(w) “can buy October, November, and December, thirty,” etc.; “and buy five each October,” etc., the court saying that any merchandise or commodity might be meant.(x) A description of goods as “the cigars” is insufficient.(y) A memorandum which does not indicate the particular goods sold is insufficient under the Statute of Frauds, although it gives the quantity of the class of goods, which quantity could be afterwards ascertained by weighing and measuring.(z) Where a particular quality of goods is contracted for, and the memorandum does not mention this, it is insufficient.(a) So where the suit was for failure to sell goods of a certain quality, there can, under the Statute of Frauds, be no recovery when the memorandum was silent as to the quality.(b) Where a sold-note described the subject of the contract as “Dunlap’s iron,” and the bought note as “Scotch iron,” and, in fact, Dunlap’s

Memo-
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fendant had already six of the thirty; and the defendant’s letter was interpreted to mean as many of the thirty as are good as the sample, send me. The memorandum of the larger cheeses was held to be sufficient under the Statute of Frauds.

(v) *Plummer v. Owens*, 1 Busbee, Eq. 254.

(w) *Bailey v. Ogden*, 3 Johns. 418.

(x) *Dilworth v. Bostiner*, 1 Sweeny, 582. In another case the court stated the fact as follows: “The defendant says” (in a letter), “on bills rendered you say cash on Wednesday, etc.; the plaintiff, in his reply, speaks of ‘my bill sent you,’ and ‘paying the oil bill.’ From the rest of the correspondence it is only to be gathered that ‘two hundred and fifty barrels,’ containing an undefined quantity of some kind of refined oil, at standard quality, etc., bought by Stocker, of the Genesee Oil

Company.” These statements were held not to be sufficient to show the subject matter of the agreement; *Stocker v. Partridge*, 2 Roberts. 202.

(y) *Jacob v. Kirk*, 2 Moo. & R. 223. See for memorandum insufficiently describing the amount of goods bought, *Kinghorne v. Montreal Telegraph Co.*, 18 U. C. Q. B. 66.

(z) *Carroll v. Cowell*, 1 J. & Symes, 50.

(a) *McClean v. Nicholls*, 4 L. T., N. S. 863; 7 Jur., N. S. 999 (the seller sued the purchaser for the value of the goods, and the defence was the Statute of Frauds).

(b) *Bacon v. Eccles*, 43 Wis. 233 (goods were delivered, but were refused, because inferior to others bought previously by the same defendants; but there was no proof that the goods were not of the average marketable quality).

iron was Scotch, but not the only Scotch iron, the discrepancy was held to be fatal.^(c) And where a memorandum of sale of a lease and furniture, stating the agreement as "excluding articles to be reserved," it was held, the list of articles reserved should have been in writing.^(d) A memorandum of marriage settlement which does not clearly show the amount of money intended to be settled is insufficient.^(e)

§ 415. The following are examples of a sufficient description of the subject of contracts relating to choses in action, and other matters not to be classed with realty or chattels: Thus, a memorandum which showed a promise to give a certain sum for the plaintiff's "services" was held sufficient, the application of the words being made by oral evidence showing the trade of the parties, etc.^(f) So in a similar contract the parol evidence was admissible to show the business of the parties, and that the dismissal of the plaintiff was improper.^(g) The defendant wrote the plaintiff as follows: "You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the

(c) *Sievwright v. Archibald*, 17 A. & Ell., N. S. 114; so, generally, where two writings differ; *Oakman v. Rogers*, 120 Mass. 214.

(d) *Johnasson v. Bonhote*, 2 Ch. D. 300.

(e) *Stoddert v. Bowie*, 5 Md. 33.

(f) *Hagan v. Domestic Sewing Machine Co.*, 9 Hun, 76; see, however, below, *Palmer v. Marquette Mill Co.*

(g) *Price v. Mouat*, 11 C. B., N. S. 510; where, in a previous collateral proceeding, the plaintiff, in the principal case, had made an affidavit that the defendant in the principal case was not a man of means, and that he knew this, because this was the latter's reason for not giving his daughter a marriage portion. In a counter-affidavit the present defendant swore as follows: "The statement contained in the affidavit of Barkworth" (the plain-

tiff) "that his reason for believing me not to be a man of considerable property is that, on his marriage with my daughter, I confessed to him my inability to provide any marriage portion is not correct. According to the best of my recollection and belief, the words I made use of on that occasion were: 'There will be no money for you now, but at my death she' (meaning my late daughter, Mrs. Barkworth) 'shall share with the rest of my children.'" It was held that, while the memorandum must on its face show that the verbal agreement to which it refers took place before marriage, this one does so, "marriage portion" meaning a gift before marriage, and "that occasion" meaning the time when the question of a marriage portion was under consideration; *Barkworth v. Young*, 4 Drew, 9; 26 L. J. Ch., 153.

memorandum of my son's," etc. *(h)* The Statute of Frauds was regarded as satisfied. So a reference to the payment of a debt due by one W. *(i)* So a promise to pay a debt to be transferred from the promissor's account to that of one B. *(j)* A somewhat singular case was as follows: The defendant signed a memorandum dated February 27th, 1854, agreeing to pay the plaintiff "one hundred and forty dollars on May 3d, 1854, for rent of house 72 Lexington Avenue," and the pleadings admitted that the house was occupied as a tenant by the defendant's brother, who, when the memorandum was made, was in arrear for rent due February 1st, 1854, and had not paid that due May 1st of the same year. It was held that the subject-matter of the promise was the debt of another, and that the memorandum was insufficient under the Statute of Frauds because not stating a consideration. *(k)* The following are some examples of the same class as those just considered, but in which the description was insufficient. Thus, a contract relating to service which does not state either the time or the nature of the employment, and uses only the word "salary," which does not necessarily indicate a year's engagement. *(l)* Signing one's name in shipping articles in a column headed "Sureties" makes an insufficient memorandum under the Statute of Frauds, because it does not show the obligation assumed. *(m)* A general reference to certain notes has been insufficient to show that they were the subject of the contract. *(n)* Letters which do not state the amount of a claim, and which make vague references to an account, will not fix the writer's liability on an account in the wife's lifetime, and which the defendant's testatrix, the wife, had acknowledged to

(h) *Shortrede v. Cheek*, 1 A. & Ell. 58; so "your draft," in a case where the Statute had no application; *Shelton v. Braithwaite*, 7 M. & W. 437.

(i) *Bateman v. Phillips*, 15 East, 272; see *Karthauss Coal Co. v. Given* (S. C. Pa.), 1 W. N. Cas. 366.

(j) *Brunton v. Dullens*, 1 F. & F. 451.

(k) *Clark v. Richardson*, 4 E. D. Smith, 175; *Daley, J.*, dissenting on the

ground that oral evidence was not admissible to show that a promise original on its face was a guaranty, and thereby to bring it within the Statute of Frauds; see § 323.

(l) *Palmer v. The Marquette Mill Co.*, 32 Mich. 274; see *Hagan v. Domestic Sewing Machine Co.*, *supra*.

(m) *Dodge v. Lean*, 13 Johns. 509.

(n) *Frank v. Miller*, 38 Md. 458.

be correct.(o) A contract of partnership within the Statute of Frauds as being for more than a year is insufficient if the writing leaves uncertain the exact interest one partner was to have.(p)

§ 416. Oral evidence is admissible and essential to apply the writing to its subject (see § 418).(q) The rule is a general one applying to all writings, whether within the purview of the Statute of Frauds or not, for no matter how detailed the description, the last step in process of identification must take place in pais. "Any note or memorandum in writing," says a recent decision, "which furnishes evidence of a complete and practicable agreement is sufficient under the Statute, and parol evidence is admissible to explain latent ambiguities, and to apply the instrument to the subject-matter."(r) The parol evidence, as has been said, is admissible only to construe and apply a description, not to show what was intended to be expressed.(s) On demurrer it will be assumed, if possible, that parol evidence will identify the property described.(t) In ejectment the identity of the premises may be shown by parol.(u) As has been

(o) *Waul v. Kirkman*, 27 Miss. 826.

(p) *Tomkins v. Randell*, 19 W. R. 416.

(q) *McMurray v. Spicer*, 16 W. R. 332; *Crooks v. Davis*, 6 Grant, Chancery, 619; *Walker v. Boulton*, 3 U. C. K. B., O. S. 254; *Williams v. Morris*, 95 U. S. S. C. 456-7; *Nichols v. Johnson*, 10 Conn. 198; *White v. Hermann*, 51 Ill. 243; *Cossitt v. Hobbs*, 56 Ill. 233; *Spaulding v. Mozier*, 57 Ill. 150; *Colcord v. Alexander*, 67 Ill. 581; *Reed v. Ellis*, 68 Ill. 209; *Colerick v. Hooper*, 3 Ind. 318; *Guy v. Barnes*, 29 Ind. 104; *Gayosos v. Baldwin*, 8 Martin, N. S. 660; *D'Aquin v. Barbour*, 4 La. Ann. 442 (a perhaps extreme application of the rule); *Childs v. Walker*, 2 Allen, 261; *Gerrish v. Towne*, 3 Gray, 88; *Mead v. Parker*, 115 Mass. 414; *McCaleb v. Pradat*, 25 Miss. 267; *Scarritt v. St. John's M. E. Church*,

7 Mo. App. 178; *White v. Motley*, 4 Baxt. 544; *Tallman v. Franklin*, 14 N. Y. 569; *Waring v. Ayers*, 40 N. Y. (1 Hand) 362; *Mayer v. Adrian*, 77 N. Car. 84; *Graf v. Wirthweine*, 1 Handy, 20; *Ferguson v. Staver*, 33 Pa. St. 413; *Ross v. Baker*, 72 Pa. St. 189; *Smith's Appeal*, 69 Pa. St. 474; *Morris's Appeal*, 88 Pa. St. 382; *Washburn v. Fletcher*, 42 Wis. 170.

(r) *Williams v. Morris*, 95 U. S. S. C. 456.

(s) *Hodges v. Howard*, 5 R. I. 158; *Parker v. Tainter*, 123 Mass. 186; *Scarritt v. St. John's M. E. Church*, 7 Mo. App. 178; *McGuire v. Stevens*, 42 Miss. 724; see *Frank v. Miller*, 38 Md. 458; *Ferguson v. Staver*, 33 Pa. St. 411; *Ripley v. Page*, 12 Vt. 355.

(t) *Slater v. Smith*, 117 Mass. 98.

(u) *Bullock v. Malone*, 1 Minor, 400.

seen there arises no difficulty, when in fact there is but one property to which the description can apply, as where a lot is sold in a certain situation, and the vendor has but the one.(v) Following out the theory that where a description, on its face seemingly sufficient to identify the property, is found to apply to more than one, the rule relating to latent ambiguities applies; it has been held that where the vendor owned several lots of land in the same street, for example, oral evidence is admissible to show which one was meant.(w) An extreme instance of this mode of interpretation, already given, was where there was a written contract providing for the building of several houses all alike and of equal value, and stating that one of the parties was to have one not especially designated, the court on oral evidence indicated a house, and enforced the contract.(x) Where a contract called for 200 acres out of a tract in Union Township, owned by the defendants who were to select the land, it was held that the selection could be shown by oral evidence, notwithstanding the Statute of Frauds.(y) Where cars were ordered to transport chattels sold, and there were two sizes, oral proof of the size that was meant was admitted.(z) It is impossible to reconcile with the general rule here given some at least of the cases that have already been given, such as *Murdock v. Anderson*.(a) In a written promise to pay a certain note it was, in England, doubted whether, if there had been two such, oral evidence would have been admissible to explain.(b) But in a case not arising under the Statute of Frauds the evidence was said to be admissible;(c) and the point was decided in a case under the Statute, and evidence was

(v) *Scanlan v. Geddes*, 112 Mass. 15; *Mead v. Parker*, 115 Mass. 414; *Carson v. Ray*, 7 Jones's Law, 610; *Waldron v. Jacob*, 5 Ir. Rep. Eq. 131, *supra*.

(w) *Hurley v. Brown*, 98 Mass. 545, citing and distinguishing a number of cases, and denying *Murdock v. Anderson*.

(x) *Ellis v. Burden*, 1 Ala. 466.

(y) *Carpenter v. Lockhart*, 1 Ind. 441.

(z) *Murphy v. Thompson*, 28 U. C. C. P. 233.

(a) 4 Jones Eq., 77, and see § 410, and the cases there given; see *Troup v. Troup*, § 411, n. (u). It may be that in all these authorities, except *Murdock v. Anderson*, the description, even on its face, was hardly adequate.

(b) *Shortrede v. Cheek*, 1 A. & Ell. 58.

(c) *Shelton v. Braithwaite*, 7 M. & W. 437.

admitted to show which of two debts was answered for in the writing.(d) The discovery of the subject-matter of the written contract, through the aid of oral proof, has not been accomplished in some instances without such an effort as would appear to do violence to the stricter rules which hedge about a writing. Where parol proof was admitted to show what lease was meant by a promise to sell the lease of certain property, the promisor having as yet, when the promise was made, procured no lease to himself, or for him to control, a long step was taken in the direction indicated.(e) A difficult point which here arises, and which can be suggested without being fully entered upon, is how far is oral evidence admissible to show what constitutes the property spoken of in the writing, and what appurtenances pass with it; two examples have been given of the refusal of such proof,(f) and the first of the following cases is, it is believed, not inconsistent with these. Thus, parol evidence was admitted to show the existence of a way appertaining to land in order to bring it within a clause of a deed expressly conveying such appertaining easements.(g) And so where a deed conveyed "all the rights, members, and appurtenances thereof," it was held that oral evidence was admissible to show that the right to the use of an alley was one of such rights.(h) But scarcely so a ruling admitting parol evidence to show what appurtenant land passed with house number so and so;(i) or parol proof, except under the exception of equitable part performance, of the assignment of boundaries by the vendor (the plaintiff).(j) It has been held that an easement cannot be orally proved to bring it within the phrase in a deed "with the appurtenances;"(k) and, indeed, the whole class of cases in which the property is described by its name as the so and so estate or tract, etc., seems open to the same difficulties unless, as was

(d) *Brunton v. Dullens*, 1 F. & F. 451.

(e) *Horsey v. Graham*, L. R. 5 C. P. 13.

(f) *King v. Wood*, 7 Mo. 389; *Vale of Neath Colliery v. Furness*; see § 412, n. (o).

(g) *Brown v. Berry*, 6 Coldw. 102.

(h) *Kirkpatrick v. Brown*, 59 Ga. 451.

(i) *Cary v. Thompson*, 1 Daly, 38, and see *Scanlan v. Geddes*, 112 Mass. 15, to the same effect.

(j) *Purl v. Miles*, 9 La. Ann. 270.

(k) *Green v. Collins*, 12 N. Y. Week. Dig. (N. Y. Ct. of App.) 179.

probably the fact in most instances of the admission of oral evidence to identify the estate, the name was one of notoriety, or the correctness of the application of the description was not denied. The same method of proof has been applied in the case of choses in action, and a debt of W. has been orally shown to be that due the plaintiff;(l) and even so vague a description as that given in a written promise to pay the plaintiff a certain sum, “as full compensation for his services,” has been applied by parol.(m) Where a written contract sued on stated the promise to be an authority to defendant’s agent to pay a debt contracted by J., and judgment was taken for want of an affidavit of defence (*i. e.*, of merits), it was not error to refuse to open the judgment on the ground that in the statement of the cause the debt was described as that of J. & M. for *non constat*, but, at the trial, the two descriptions might have been shown to be identical.(n)

§ 417. While there is great diversity of decision on the point, the weight of authority is strongly in favor of treating the price as an essential term of the contract, which must appear in the memorandum required by the Statute of Frauds.(o) In the special case of a contract for the sale of land, it was said in a Vermont decision that in England even, where the rest of the contract had been executed, the price must appear in the writing; but otherwise in America.(p)

(l) *Bateman v. Phillips*, 15 East, 272.

(m) *Hagan v. Domestic Sewing Machine Co.*, 9 Hun, 76.

(n) *Karthauss Coal Co. v. Given*, 1 W. N. C. 366.

(o) *Blagden v. Bradbear*, 12 Ves., Jr., 471; *Morgan v. Sykes*, in the Exchequer (not reported), cited in *Coats v. Chaplin*, 3 Q. B. 486; *Elmore v. Kingscote*, 5 B. & C. 583; 8 D. & R. 343; *Archer v. Scott*, 17 Grant (Can.), 249; *Flintoft v. Elmore*, 18 U. C. C. P. 281; *Smith v. Arnold*, 5 Mason, C. C. 414; *Williams v. Morris*, 95 U. S. 456; *Adams v. McMillan*, 7 Porter, 80; *Frazier v. Howe*, 15 Chic. Leg.

News, 296 (S. C. Ill.); *Ellis v. Deadman’s Heirs*, 4 Bibb, 467; *Kay v. Curd*, 6 B. Mon. 102; *Holmes v. Evans*, 48 Miss. 247; *Lang v. Henry*, 54 N. H. 59; *Welsh v. Bayaud*, 21 N. J. 186; *Johnson v. Buck*, 35 N. J. L. 340; *German v. Machin*, 6 Paige Ch. 292; *Coles v. Bowne*, 10 Paige Ch. 335; *Stocker v. Partridge*, 2 Rob. Sup. Ct. 202; *Stone v. Browning*, 68 N. Y. 600; *Soles v. Hickman*, 20 Pa. St. 180; *Eargood’s Estate*, 1 Pearson, 400; *Ide v. Stanton*, 15 Vt. 689.

(p) *Hodges v. Green*, 28 Vt. 358, citing *Cocking v. Ward*, *Kelly v. Webster*, *Smart v. Harding*, and also a number of American cases.

Even in Pennsylvania, where the fourth section is not in force, it would be necessary that the price should be stated, like any other term of the contract.(g) In a Maryland case it was doubted whether the price of land could, under the Statute of Frauds, be left in parol, to be fixed by arbitration.(r) A writing, otherwise sufficient under the Statute of Frauds, is not invalid because it leaves the price to be settled by arbitration.(s) Where a memorandum, otherwise complete, was not intended as evidence, and did not give the price, but was a preliminary official paper, which had to be executed in order that a public officer might fix the price, it was held that the Statute of Frauds was not satisfied.(t) In Louisiana a transfer in writing of land, or a *dation en payment*, must show a fixed price to be valid.(u) Under the Mexican law, and by custom of California, a contract of sale of land must be in writing, and show at least the names of the parties, the thing sold, the date of the transfer, and the price paid.(v) *Semble*, that in a contract of lease the rent as well as the terms must appear.(w) So under the acts of Parliament requiring the transfer of a vessel to be in writing, the memorandum must show the price.(x)

§ 418. The following are some examples of memoranda sufficiently showing the price or the reverse: Thus, Examples. the defendant wrote, "I cannot sell at your offer, . . . but . . . I will sell enough at the contract price to pay it" (a note due by him), "or I will give 2000 acres for my note; . . . but to sell for \$20,000 is killing." The defendant's pleadings showed an offer by the plaintiff to pay \$20,000, which was refused, and the plaintiff's acceptance of the offer in the letter bound the bargain for 2000 acres at \$20,000.(y)

(g) *Soles v. Hickman*, 20 Pa. St. 182; and see Pennsylvania cases among those just given.

(r) *Griffith v. Frederick Co. Bank*, 6 Gill & J. 439; see below.

(s) *Norton v. Gale*, 95 Ill. 539, citing *Brown v. Bellows*, 4 Pick 178.

(t) *Rogers v. Hadley*, 2 H. & C. 247.

(u) *Kleinpeter v. Harrigan*, 21 La. Ann. 197.

(v) *Stafford v. Lick*, 10 Cal. 16.

(w) *Powell v. Lovegrove*, *infra*; *Hodges v. Howard*, 5 R. I., 158.

(x) *Kain v. Old*, 2 B. & C. 633.

(y) *Washburn v. Fletcher*, 42 Wis. 170; so a memorandum reading, "It is agreed, etc., that Bird is to have the

Where a buyer signed an order for certain goods on the seller but the memorandum did not state the price, and the defendant wrote asking for an invoice; the plaintiff sent an invoice giving the prices, which were, as agreed, at a discount off the prices given in a printed list, to which the numbers in the defendant's original order referred; the defendant wrote on the receipt simply declining the goods; the memorandum was held to be insufficient under the Statute of Frauds for not naming a price; the price named in the invoice did not bind the defendant, because not signed by him.(z) Where the memorandum was—

W. W. Goddard	.	.	12 Mos.
300 Bales	.	.	7½.
			S. M. M.
			W. W. G.

parol evidence was admitted to show 7½ meant 7½ cents per yard, and the memorandum was held to be sufficient.(a) Where land having been knocked down at auction to the defendant, who was one of the sellers, and he assigned his bid at an advance price to the complainant, and the auctioneer made a memorandum of sale, stating everything but the advance price, the latter was held not to be part of the price so as to call for mention in the writing, and that the second vendee was entitled to have a decree of specific performance against the first.(b) A memorandum which related to the negotiation of lands about to be taken for a railway, and which referred to the compensation as to be settled either by arbitration or a

refusal of a certain farm, etc., which, etc., was bought by me for, etc., \$1940," showed the price sufficiently; Bird v. Richardson, 8 Pick. 252. A memorandum was as follows :—

No. of Lot.	Name of Purchaser.	Price.
1	S. Klous,	\$1670.
2	S. Klous,	620.
3	S. Klous,	9½ cts.
4	S. Klous,	9½.

The dispute was as to lots 3 and 4, and it was held that at the trial there might be evidence of usage which would show that 9½ cts. and 9½ meant to show the

price; the memorandum, therefore, on demurrer, was not insufficient; Gowen v. Klous, 101 Mass. 454, citing Salmon Falls Co. v. Goddard, and other cases; see Bourland v. Peoria, 16 Ill. 542.

(z) Goodman v. Griffiths, 1 H. & N. 577.

(a) Salmon Falls Co. v. Goddard, 14 How. U. S. 454; see Gowen v. Klous, just above.

(b) Bailey v. LeRoy, 2 Edw. 515 (but was not the advance price the price of the transfer, and was not the latter within the Statute of Frauds?).

jury, at the option of the owner, is fatally defective in not fixing a price, and will not be decreed to be specifically performed.(c) "This to certify that I have received of, etc., the sum of, etc., and have applied to the sale of lot, etc.," is an insufficient memorandum because not stating the price.(d) A memorandum of sale which gives no price, but states a penalty upon the vendor on failure to give a deed, cannot be made sufficient by the vendee's subsequent oral agreement to make the penalty the price.(e) A note of sale of land, giving the total price, and stating that a part, not defining it, was to remain on mortgage, is insufficient.(f)

§ 419. An effort has been made to evade the Statute of Frauds on this point by assuming, in the absence of an express statement of a price, that a reasonable price was meant, and that exact lawyer, Judge Willes, gave this as his opinion.(g) But, on the other hand, it has been said that this is only true of executed contracts.(h) A memorandum referring to an oral agreement, and which failed to state the price, was held to be sufficient on the testimony of one witness to the effect that the land was worth a certain amount; that this value had been assented to by the vendor and had been in fact paid.(i) In a Michigan case it was said that, if a reasonable price is agreed on without further definition, the memorandum should state this, and the market price will not be presumed to be reasonable.(j) Where the memorandum admits that the price has been paid, it is not

(c) *Morgan v. Millman*, 3 De G. M. & G. 36; 22 L. J. Ch., 897 (Knight-Bruce, L. J., said that the case fell far short of *Gregory v. Mighell*; *semble secus*, however, where the price had been fixed by valuers at the time the memorandum was executed); *Hemming v. Perry*, 2 M. & Payne, 380.

(d) *Irving v. Merrygold*, 3 U. C. Q. B. 273.

(e) *Kelly v. Sweeter*, 17 Grant (Can.), 375.

(f) *Grace v. Denison*, 114 Mass. 17; *Foot v. Webb*, 59 Barb. 53; see the note for other examples of memoranda in-

sufficient for not giving the price; *Holmes v. Evans*, 48 Miss. 247; *Peirce v. Corf*, L. R. 9 Q. B. 214; *Blair v. Snodgrass*, 1 Sneed, 25.

(g) *Joyce v. Swann*, 17 C. B., N. S. 102, citing *Hoadly v. McLaine*, but as to this see below.

(h) *Acebal v. Levy*, 10 Bingh. 380; see *Jeffcott v. North British, etc., Co.*, Ir. Rep. 8 C. L. 19.

(i) *Johnson v. Ronald*, 4 Munf. 78.

(j) *James v. Muir*, 33 Mich. 226, citing *Acebal v. Levy and Valpy v. Gibson*.

defective in not stating such price,^(k) and *seem* an actual payment, though subsequent and not recited in the memorandum, is enough.^(l) Oral evidence is admissible to show that a memorandum complete on its face is defective for not expressing the price.^(m) A memorandum which states the price to be “on moderate terms” is sufficient.⁽ⁿ⁾ There is a distinction between the words “value” and “price,” and, therefore, under 9 Geo. IV., c. 14, § 7, using the former, the memorandum need not state the price.^(o) There is no inconsiderable authority in the United States for the opposite rule to that stated in the beginning of this discussion. As has been already said in the case of contracts for the sale of land a Vermont decision, admitting that English law required a statement of the price, claimed that the American doctrine was otherwise.^(p) Some of the rulings dispensing with written evidence of the price are cases of executed contracts, as where a deed for the land has been accepted;^(q) or where the price has been paid, other parts of the contract remaining executory.^(r) It has been decided in a written contract relating to land the price need not be given.^(s) And a memorandum addressed by the defendants to the plaintiff, requesting the latter to get them 360 hogs instead of 250, and saying nothing as to the price, was held sufficient.^(t) There remains to be noted only a group of cases where the expression in the memorandum of the stipulated price was dispensed with on a wider ground,

(k) *Fugate v. Hansford*, 3 Litt. 262.

(l) *Powell v. Lovegrove*, 8 De G., M. & G. 363.

(m) *Jeffcott v. North British, etc., Co.*, Ir. Rep., 8 C. L. 19, and see *supra*.

(n) *Ashcroft v. Morrin*, 4 M. & G. 451; 6 Jur., 783.

(o) *Hoadley v. M'Laine*, 10 Bingh. 486 (the writing indicated that no price had been agreed upon, and that it was a *carte blanche* order, and this the testimony confirmed).

(p) *Hodges v. Green*, 28 Vt. 358.

(q) *Gully v. Grubbs*, 1 J. J. Marsh. 388; see *Hodges v. Green*, *supra*, and see the chapter on Voluntary Performance.

(r) *Fugate v. Hansford*, 3 Litt. 262.

(s) *Adkins v. Watson*, 12 Tex., 199; *Fiske v. McGregory*, 34 N. H. 418; see *Seagood v. Meale*, Prec. Ch. 560.

(t) *O'Neil v. Crain*, 67 Mo. 250. In *Smith v. Dublin, etc.*, R. W., 3 Ir. Ch. 230, it was held that a written notice to treat, signed by the secretary of a corporation authorized to take land, is good, though not under the corporate seal, and that the land-owner only has signed the memorandum fixing the price does not make it less sufficient; *semble*, that the company would have been bound if the price have been proved by oral evidence only.

and one which appears to require a statement of the promise and of the parties only. For a consideration of the validity of such a writing under the Statute of Frauds, setting forth a bare promise from one to another to do a definite act as to convey land, expressing no terms and naming no price, see above. So far as these decisions relate to our present subject it is well to observe that if it is assumed that there is no other term or condition than the promise to convey, and there may well be none such, then we must concede that these are authorities supporting the validity of a memorandum which omits the price.^(u)

(u) See *Plunkett v. Methodist Episcopal Church*, 3 Cush. 566; *Holman v. Bank of Norfolk*, 12 Ala. 369; *Johnson v. Ronald*, 4 Munf. 77; but see, *contra*, *Kingsbury v. Burnside*, 58 Ill. 335.

CHAPTER XIX.

THE CONTENTS OF THE MEMORANDUM— THE CONSIDERATION.

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| <p>§ 420. Contract under Statute of Frauds must have a consideration.</p> <p>§ 421. Memorandum required to show consideration.</p> <p>§ 422. <i>Wain v. Warlters</i>.</p> <p>§ 423. A point under the law of New York.</p> <p>§ 424. Statutes expressly permitting oral proof of the consideration.</p> <p>§ 425. Statutes expressly requiring a statement of the consideration.</p> <p>§ 426. States where the law, apart from a special statute, is, or was, uncertain.</p> <p>§ 427. Memorandum not required to state consideration.</p> <p>§ 428. Rulings based on the difference between the words "promise" and "agreement."</p> <p>§ 429. Manner of statement of consideration; can be implied.</p> <p>§ 430. The words "value received."</p> <p>§ 431. Effect of a seal; commercial pa-</p> | <p>per; whether writing imports a consideration.</p> <p>§ 432. Memorandum of guaranty; when memorandum shows that the promisee relied on guaranty.</p> <p>§ 433. Rule as to guaranty contemporaneous with obligation guaranteed; valid memoranda.</p> <p>§ 434. The New York decisions as to whether contemporaneous written contracts show a consideration.</p> <p>§ 435. Examples of guaranties of promissory notes under the New York rule.</p> <p>§ 436. Examples of memoranda sufficiently showing the consideration.</p> <p>§ 437. The expression of a past and of a future consideration.</p> <p>§ 438. Consideration of forbearance.</p> <p>§ 439. Miscellaneous examples of memoranda showing sufficiently or insufficiently the consideration of the contract.</p> |
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§ 420. A WRITTEN contract under the Statute of Frauds must, like any other, have a consideration,^(a) and at the time the

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| <p>(a) <i>Watson v. Dunlap</i>, 2 Cr. C. C. 14; <i>Brown v. Adams</i>, 1 Stew. (Ala.) 54; <i>Henley v. Brown</i>, id. 144; <i>Hester v. Wesson</i>, 6 Ala. 415; <i>Click v. McAfee</i>, 7 Porter, 65; <i>Beall v. Ridgeway</i>, 18 Ala. 118; <i>Lawrence v. Stonington</i>, 6 Conn. 525; <i>Cook v. Bradley</i>, 7 Conn. 61; <i>Lines v. Smith</i>, 4 Flor. 47; <i>Crane v. Bullock</i>, R. M. Charl. 319; <i>McConnell v. Brillhart</i>, 17 Ill. 354; <i>Starr v. Earle</i>,</p> | <p>43 Ind. 479; <i>Bean v. Burbank</i>, 16 Me. 460; <i>Cutler v. Everett</i>, 33 Me. 201; <i>Hannan v. Towers</i>, 3 H. & J. 149; <i>Pfeiffer v. Kingsland</i>, 25 Mo. 67; <i>Cook v. Elliot</i>, 34 Mo. 586; <i>Burnet v. Bisco</i>, 4 Johns. 236; <i>Fyler v. Givens</i>, 3 Hill (S. Car.), 52; <i>Winthrop v. Lane</i>, 3 Des. 341; <i>Beers v. Spooner</i>, 9 Leigh, 156; <i>Hopkins v. Richardson</i>, 9 Gratt. 490; <i>Chesapeake R. R. v. Winkler</i>, 3 Va. L.</p> |
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promise is given, so that a subsequent receipt of funds out of which to fulfil it is not a sufficient consideration.^(b) On the other hand, it has been regarded as an additional reason for regarding a memorandum made subsequently to the contract itself as sufficient, that the consideration was performed at the time of contract made.^(c) A writing does not, even *prima facie*, import a consideration.^(d) In *Pillans v. Van Mierop*, Burr. 1669, *semble*, there is a *dictum* by Lord Mansfield that the Statute of Frauds goes on the principle that a writing imports a consideration; but see *contra*. By statute in Alabama a writing is treated in the pleadings of a case as *prima facies* of consideration; but if the consideration is denied, it must be proved.^(e) In Indiana a written promise to pay money implies a consideration *prima facie*.^(f) Apart from statutory provision, the ordinary rule is the other way.^(g) An undertaking required by law, as, for example, securityship for costs, need not have or show a consideration;^(h) the statute, moreover, using the word "undertaking."⁽ⁱ⁾ That a verbal contract is upon a consideration will not take it out of the Statute.^(j)

§ 421. The question whether the memorandum to be complete should express the consideration has been the one the most contested under the Statute of Frauds. Nor is it everywhere settled even now, though statute or decision has done so in almost all the states.

J. 55; *Winkler v. Chesapeake R. R.*, 12 W. Va. 699; *Barrell v. Trussell*, 4 Taunt. 120; *Parker v. Dutcher*, 2 U. C. Jur. 110. See 9 Peters, Abr. (Am. ed.) p. 409-10 (n.). For exceptions to this rule, see § 441.

(b) *Tenny v. Prince*, 4 Pick. 387.

(c) *Schwärman v. Gunkel*, 1 Kent. Law Rep. 406.

(d) *Dodge v. Burdell*, 13 Conn. 172.

(e) See R. S. Ala. § 2681; *Click v. McAfee*, 7 Porter, 65; *Brick Dig. of Reports*, I. p. 382, § 112; *Nesbit v. Bradford*, 6 Ala. 750; so in Arkansas, *Woodruff v. McDonald*, 33 Ark. 101;

see as to the rule in *Kansas*, *Roller v. Ott*, 14 Kan. 615 (citing cases); in California, see *Happe v. Stout*, 2 Cal. 460.

(f) *Beeson v. Howard*, 44 Ind. 415.

(g) *Linder v. Lake*, 6 Ia. 167.

(h) *Bildersee v. Aden*, 62 Barb. 191, citing cases.

(i) *Thompson v. Blanchard*, 3 Comst. 335.

(j) *Organ v. Stewart*, 1 Hun, 411 (a contract relating to chattels); *Prime v. Koehler*, 77 N. Y. 93; 7 Daley, 350; *Combs v. Harshaw*, 63 N. Car. 199; *Simpson v. Patten*, 4 Johns. 422.

In the following states it is or was necessary to state the consideration in the memorandum, though no provision of the Statute of Frauds expressly required this.^(k) *Seem*, that even where by statute parol proof of the consideration is admissible, a promise by the other party cannot be so proved,

(k) Great Britain, before 19 and 20 Vict., c. 97, July 29, 1856: *Wain v. Warlters*, 5 East, 16; *Jarvis v. Wilkins*, 7 M. & W. 410; *Price v. Richardson*, 15 M. & W. 540; *Edwards v. Kelly*, 6 M. & S. 208; *Sweet v. Lee*, 3 M. & G. 452; see note by reporter, saying that *Sweet v. Lee* was the first case applying the rule to "year" contracts; *Lyon v. Lamb*, Fell on Guaranty, App. iii.; *Clancy v. Piggott*, 4 N. & M. 502; 2 A. & Ell. 473; *Powers v. Fowler* 4 Ell. & Bl. 516.

Canada: *Gerow v. Clark*, 9 U. C. Q. B. 223.

Alabama: *Rigby v. Norwood*, 34 Ala. 132 (approving of *Wain v. Warlters*, apart from the Alabama statute expressly requiring the consideration to be stated).

Delaware: *Weldin v. Porter*, 4 Houst. 239.

Georgia: *Henderson v. Johnson*, 6 Ga. 390 (A. D. 1844); but see, doubting this, *Hargraves v. Cooke*, 15 Ga. 321 (A. D. 1850 and 1854); see *contra post*.

Illinois: *Prather v. Vineyard*, 9 Ill. 48; *Patmor v. Haggard*, 78 Ill. 609 (before 1874). In *Harwood v. Kiersted*, 20 Ill. 373, the question was raised, but not decided.

Maryland: *Wyman v. Gray*, 7 Harr. & J. 409; *Elliott v. Giese*, 7 Harr. & J. 457; *Nabb v. Koontz*, 17 Md. 283; *Carroll v. Nixon*, 2 Miles (Phila.), 428, passing on a Maryland contract; *Sumrall v. Ridgely*, 20 Md. 116; *Hutton v. Padgett*, 26 Md. 231; *Deutsch v. Bond*, 46 Md. 168; *Ordeman v. Lawson*, 49 Md. 155, citing cases; *Culbertson v. Smith*, 52 Md. 634, citing cases.

In a *dictum* in one Missouri case: *Bartlett v. Matson*, 1 Mo. App. 155; but see *contra post*, § 437.

Two cases in New Hampshire: *Neelson v. Sanborne*, 2 N. H. 414; *Underwood v. Campbell*, 14 N. H. 393; but doubted in *Britton v. Angier*, 48 N. H. 422.

New York, prior to 1830 and since 1863: *Sears v. Brink*, 3 Johns. 215; *Kerr v. Shaw*, 13 Johns. 236; *Thompson v. Blanchard*, 3 Comst. 335; *Clark v. Richardson*, 4 E. D. Smith, 174; *Castlev. Beardsley*, 10 Hun, 343; *Smith v. Ives*, 15 Wend. 182 (R. S., 1830, said to be declaratory on this point); *Wood v. Wheelock*, 25 Barb. 625; *Sackett v. Palmer*, 25 Barb. 179; *Wright v. Weeks*, 25 N. Y. 155; 1 Bosw., 272.

Two cases in South Carolina: *Aikin v. Cheeseborough*, 1 Hill (S. Car.), 173; *Stephens v. Winn*, 2 N. & McCord, 372 (distinguished in *Miller v. Irvine*, *Fyler v. Givens*, *Aikin v. Duren*, 2 Nott & McC. 370); *Fyler v. Givens*, 3 Hill (S. Car.) 52, held that in contracts relating to land, and in consideration of marriage, the consideration must be stated; see *Lecat v. Tavel*, 3 McCord, 158; and see, generally, *contra post*. In *Legare v. Potter*, 1 Rice, S. Car. Dig. 362, it was said that the point had been in doubt till then (1825), but that the consideration need not be expressed; see § 437.

Texas: *Thomas v. Hammond*, 47 Tex. 49 (citing cases); on the general point, see *Pitman on Princip. and Surety*, p. 73, n. 3.

though it was the consideration of the other promise;(l) at common law the consideration of a writing could be proved by parol.(m) The admissibility of oral evidence to show the want of a consideration of a deed or other writing, or to contradict that stated in the writing, will be adverted to in another place; it may be said that, as a general rule, the evidence for such a purpose is admissible.(n) Where a promissory writing given for the debt of another, and to assign certain personalty, shows on its face no consideration; it is competent to show by parol that it was not merely voluntary; that it had a consideration, and that it was in reliance upon such engagement that certain funds had been furnished to and certain liability assumed by the plaintiffs on behalf of the party answered for;(o) and where the contract would have been good by parol, oral evidence of the consideration is admissible if it is reduced to writing.(p)

§ 422. The leading case which established in England not without protest the necessity of expressing the consideration of the contract in the memorandum was *Wain v. Warlters*, decided in 1804. The judges in that case gave great attention to the words "promise" and "agreement" as used in the Statute of Frauds. Lord Ellenborough regarded the phraseology of the Statute as being deliberate, and said that the word "agreement" meant the assent of two minds so certain that each may have an action on it, and that the word "promise," when used in the Statute, was so used in order that the law should not seem to give validity to a written contract merely because written. Lawrence, J., and Le Blanc, J., relied upon the point that the word "promise" did not recur, and that the word "agreement" was employed in the latter part of the fourth section of the Stat-

(l) *Whipple v. Parker*, 29 Mich. 371. 353; *Wolf v. Fletemeyer*, 9 Chic. Leg.

(m) *Lightle v. Berning*, 15 Nev. News, 204; *Hannan v. Hannan*, 123 391; *Cummings v. Dennett*, 26 Me. Mass. 441; 1 Brick. Dig. (Ala.), p. 399; *Barnes v. Perine*, 15 Barb. 250; 271 *et seq.*; 1 Davis's Dig. (Ind.), p. Smith *v. Ide*, 3 Vt. 295, denying *dictum* to the *contra* in *Morley v. Booth*; 529, § 174.

(o) *Flower v. Buller*, 15 Ch. Div. 673. *Bartlett v. Matson*, 1 Mo. App. 155.

(n) See, also, *Wait v. Wait*, 28 Vt. (p) *Dyer v. Gibson*, 16 Wis. 560.

ute.(q) It was said soon afterwards that the rule of *Wain v. Warlters* did not apply under the seventeenth section;(r) and it has been said that the word "agreement" in the fourth section was thought in *Wain v. Warlters* to mean more than the word "bargain" used in the seventeenth section.(s) The distinction between the two sections was clearly set forth in a later case, where it was said that, under the seventeenth section, a statement of the transaction would necessarily show the consideration, and a written promise, for example, "I will pay £50," could not evidence a sale of goods.(t) The doctrine of *Wain v. Warlters*, firmly as it became established in the end, met with distinguished opposition when first announced. At common law it was doubted by Chief Justice Dallas,(u) and in chancery by Lord Eldon, who in one case directly decided the opposite,(v) and almost as positively in another,(w) in which the memorandum showed on its face no good consideration, but only a promise to answer for goods supplied a third person; but parol evidence was admitted to show that such goods were actually furnished, and thereby a good consideration arose (*i. e.*, of loss to the promisee). When the doctrine of *Wain v. Warlters* came again before the court

(q) 5 East, 16, Lord Ellenborough citing Comyn's definition of an agreement, and commending the precision of the Statute of Frauds; see notes to Day's edition of 5th East; see Saunders v. Wakefield, 4 B. & Ald. 559, Abbott, C. J., adopting Lord Ellenborough's argument.

(r) Egerton v. Mathews, 6 East, 308.

(s) Laythoarp v. Bryant, 2 Bingh. N. C. 735; Marshall v. Lynn, 6 M. & W. 116; but the word "bargain" in this section is called there "such contract," and the latter word is even more comprehensive than "agreement;" see Patmor v. Haggard, 78 Ill. 609; see Hunt v. Adams, 5 Mass. 360, where the word bargain was considered to mean as much as agreement in this connection, and where Egerton v. Mathews was ap-

proved and *Wain v. Warlters* doubted; and see Packard v. Richardson, 17 Mass. 129, in which the word "bargain" was thought to have a wider meaning than "agreement." For cases holding Egerton v. Mathews and *Wain v. Warlters* inconsistent see *infra*.

(t) Jenkins v. Reynolds, 3 Brod. & B. 18.

(u) Boehm v. Campbell, 8 Taunt. 681; and see Morris v. Stacey, 1 L. Holt, 153

(v) *Ex parte Minet*, 14 Ves., Jr., 190 (Aug. 12, 1807).

(w) Gardom (*Ex parte*), 15 Ves., Jr., 287. In *Black v. Gessner*, 2 Thomp., No. Sc. 58, Chief Justice Haliburton said that he recollected the surprise with which the profession received *Wain v. Warlters*.

which decided the latter, Lord Ellenborough, though urged by counsel to overrule the decision, put the question by and decided the then suit on another ground.(x) Later cases confirmed the rule, and *Wain v. Warlters* remained law till done away with by Statute.(y) As the roll of authorities given a page or two above shows, the rule of *Wain v. Warlters* has been followed to some extent in America. In an interesting decision in New York the subject was discussed at length, though the Statute of that state then expressly required the consideration to be explicitly given in the memorandum.(z) In Illinois the rule in question was approved in a recent case, which considered the word "contract" in this connection stronger than the word "agreement."(a) In Wisconsin *Wain v. Warlters* has been applied on principle, although this was unnecessary, the rule having been adopted by statute.(b)

§ 423. To go back to the law of New York, attention may be

A point under the law of New York.

called here to the peculiar difficulty which has arisen in that state, from the fact that the statutory requirement of the expression of the consideration in the memorandum has been repealed. The controversy at once arose as to the effect of this repeal: did it mean to dispense with the expression of the consideration, or did it mean to leave the law as it was before the repealed section was passed? The weight of authority is in favor of the latter view, because, it being well settled before the repealed law was passed that the consideration must be expressed, and the law itself having been decided to require, not merely the expression of the consideration, but an *explicit* expression, the repeal

(x) *Goodman v. Chase*, 1 B. & Ald. 303.

(y) *Jenkins v. Reynolds*, 3 Br. & Bingh. 18, citing *Lyon v. Lamb*, *Saunders v. Wakefield*, and distinguishing *Stadt v. Sill*, *Bateman v. Phillips*, *Morris v. Stacey* as cases where the memorandum showed the consideration, and the policy of the doctrine was regarded as good (see *Houghton v. Ely*, 26 Wis. 185, denying this). *Morley v. Boothby* citing the above cases, and suggesting that *Ex parte Minet* is misreported, and

that in *Ex parte Gardom*, *Boehm v. Campbell*, and *Puce v. Marsh* the consideration was sufficiently expressed.

(z) *Bennett v. Pratt*, 4 Denio, 276, citing, among other English cases, *Clancy v. Piggott*, *Morley v. Boothby*, and, in New York, *Sears v. Brink* and *Rogers v. Kneeland*.

(a) *Patmor v. Haggard*, 78 Ill. 609.

(b) *Taylor v. Pratt*, 3 Wis. 692, elaborately defining an agreement so as to include a consideration.

meant that the latter was not necessary; and, while an expression of the consideration was still essential, any words by which the consideration could be gathered or inferred were enough.(c) The New York cases which, before the Revised Statutes and the Statute of 1813, opposed the rule of *Wain v. Warlters*, will be given later.

§ 424. It has been expressly enacted in the following states that the consideration need not be expressed in the memorandum.(d) It has been suggested that Lord Tenterden's act as to the expression of consideration might only apply to the second clause of the 4th section of the Statute of Frauds.(e) In Georgia it was held that the act dispensing with the expression of the con-

Statutes expressly permitting oral proof of the consideration.

(c) *Castle v. Beardsley*, 10 Hun, 343; denying *Speyers v. Lambert*, 1 Sweeney, 338 (in the Superior Court of New York); but see *May v. National Bank*, 9 Hun, 111, and *Patchen v. Brown*, 3 Alb. L. J. 150 (both cases in the Supreme Court), to the same effect as *Spyers v. Lambert*. In *Marsh v. Chamberlain*, 2 Lans. 293, the question was regarded as an open one. *Clark v. Hampton*, 4 Th. & Cook, 75; *Mosher v. Hotchkiss*, 3 Abb. App. Dec. 326; *Miller v. Cook*, 23 N. Y. 495; *Burrell v. Root*, 40 N. Y. (1 Hand) 496, were cases of contracts made before the act of 1863, ch. 404, striking out the words in R. S. Pt. II. c. 7, tit. 2, § 2, "expressing the consideration."

(d) California (as regards guaranties only): Civ. Cod. 1874, § 2793.

Georgia: *Sorrell v. Jackson*, 30 Ga. 901 (act of 1852, 5 P. L. 243, not being repealed by act of 1856, P. L. 260); *Black v. McBain*, 32 Ga. 129. To the same effect see, also, *Baker v. Herndon*, 17 Ga. 571; but this clause was left out of the revision of 1862, and is not now in use.

Illinois, since 1874: *Patmor v. Haggard*, 78 Ill. 609, citing *McConnell v. Brillhart*.

Indiana, since 1843: *Hiatt v. Hiatt*, 28 Ind. 34; *Wills v. Ross*, 77 Ind. 1.

In Iowa, as has been seen, a writing presumes a consideration. *Wise v. Ray*, 3 Iowa, 431.

Kentucky, since 1852: *Ratliff v. Trout*, 6 J. J. Marsh. 606; *Ellis v. Merriman*, 5 B. Mon. 296.

Massachusetts, since 1836: *Wetherbee v. Potter*, 99 Mass. 361.

Michigan, since 1838: *Hall v. Soule*, 11 Mich. 494; *Scott v. Bush*, 26 Mich. 420; *Whipple v. Parker*, 29 Mich. 371.

Nebraska, since 1866.

New Jersey, since 1875.

Virginia and West Virginia, since 1850.

Great Britain, since 1856 (19 and 20 Vict. C. 97, § 3): *Hoad v. Grace*, 7 H. & N. 496; 31 L. J. Exch. 98; *Holmes v. Mitchell*, 7 C. B. N. S. 370; see *Encly. Britt. Title "Guarantee,"* where it is stated that this act was passed upon the petition of north of England traders, who suffered from the difference between the English and Scotch law.

(e) *Wynne v. Hughes*, 21 W. R. 628 (per Bramwell, B.).

ration was retro-active and declaratory, and, therefore, it was decided in 1854 that a memorandum expressing no consideration was valid, though executed in 1847, and though the act in question was not passed until 1852.(f)

Statute expressly requiring a statement of the consideration. § 425. In the following states the question has been determined by a statute expressly requiring a statement of the consideration.(g)

States where the law, apart from a special statute, is or was uncertain. § 426. In some of the states where a statute was enacted to end all doubts upon the question, the previous law had been quite unsettled, as in Indiana.(h) So the early cases in New York, though probably the law, was settled in favor of adopting the rule of

Wain v. Warlters, even before the Act of 1813, or the Revised Statutes of 1830;(j) and since the Act of 1863, repealing the express provision in the Revised Statutes as to the statement of the consideration,(k) there has been a conflict of

(f) Baker v. Herndon, 17 Ga. 571.

(g) Alabama (since 1852): Rigby v. Norwood, 34 Ala. 132; Davidson v. Rothschild, 49 Ala. 109; Wells v. Thompson, 50 Ala. 85; Locke v. Humphries, 60 Ala. 117.

California (prior to 1874): Ellison v. Jackson, 12 Cal. 542; Crooks v. Sully, 50 Cal. 257; Colorado (since 1861); Idaho (since 1864).

Minnesota (since 1851): Walker v. McDonald, 5 Minn. 461; Sheldon v. Butler, 24 Minn. 515; Wilson Sewing Machine Co. v. Schnell, 20 Minn. 40; Nichols v. Allen, 22 Minn. 283.

Montana (since 1872); Nevada (since 1861): Van Doren v. Tjader, 1 Nev. 388.

New York (from 1830 to 1863): Indiana (State of) v. Woram, 6 Hill, 36; Rogers v. Kneeland, 13 Wend. 121; Larson v. Wyman, 14 Wend. 246; Packer v. Willson, 15 Wend. 346; Smith v. Ives, 15 Wend. 183; Clark v. Richardson, 4 E. D. Smith, 174.

Oregon (since 1863): Corbitt v. Salem Co., 6 Oregon, 405.

Utah (since 1876); Wisconsin (since 1839): Turton v. Burke, 4 Wis. 121; Putney v. Farnham, 27 Wis. 189; Parry v. Spikes, 49 Wis. 387.

(h) Gregory v. Logan, 7 Blackf. 112, which has been cited as supporting Wain v. Warlters, is not conclusive, the contract being under seal; it decides that the consideration of an administrator's promise need not be expressed. In McCoskey v. Deming, 3 Blackf. 146, the question was left undecided, and was stated to be doubtful.

(j) D'Wolf v. Rabaud, 1 Peters (U. S. S. C.) 501, citing Leonard v. Vredenburg (as decision and not dictum), Bailey v. Freeman, Nelson v. Dubois; and Leonard v. Vredenburg distinguished Wain v. Warlters as a case of nude pact; but see Rogers v. Kneeland, contra, the agreement being before the Revised Statutes.

(k) May v. National Bank of Malone, 9 Hun, 111; see supra, act of 1863, c. 464, p. 802; Speyers v. Lambert, 1 Sweeney, 338.

decision, the cases given below holding a statement of the consideration no longer necessary, while probably the weight of authority is the other way, as has been seen. In New Jersey the question was an open one until 1875, when the rule of *Wain v. Warlters* was done away with by the legislature.(l)

§ 427. The decided weight of authority in America is in favor of holding a statement of the consideration in the memorandum unnecessary if not expressly required by a statute.(m) In *Sage v. Wilcox*, Chief Justice Hosmer said that agreement meant concord

Memorandum not required to state consideration.

(l) *Laing v. Lee*, Spencer, 339, citing *Buckley v. Beardslee*, 2 Southard, 572, as denying the rule of *Wain v. Warlters* (and it is generally so instanced); the case is not really decisive, as the consideration seems to have been stated in the memorandum; it is certainly not an authority supporting *Wain v. Warlters* as stated by Mr. Browne (Statute of Frauds, § 391), who, perhaps, mistook Judge Southard's dissenting opinion for that of the court.

(m) United States (Federal Courts): *D'Wolf v. Rabaud*, 1 Peters, U. S. S. C. 501; *Fowler v. McDonald*, 4 Cr. C. C. 297; *How v. Kimball*, 2 McLean, 107, saying that Lord Ellenborough in *Wain v. Warlters* had admitted that the law previously had been supposed to be the other way, and citing *Newbery v. Armstrong* and *Davies v. Wilkinson* as evasions of the rule of *Wain v. Warlters*. *Quære*, whether an opposite ruling was made in the *Union Bank v. Coreoran*, 5 Cranch, C. C. 513.

Connecticut: *Sage v. Wilcox*, 6 Conn. 81, citing *Beckwith v. Angell*, a Connecticut case not reported; *Nichols v. Johnson*, 10 Conn. 198.

Florida: *Dorman v. Bigelow*, 1 Flor. 290.

Georgia: *Baker v. Herndon*, 17 Ga. 571; *Davis v. Tift*, 11 Am. L. Rec. 701, S. C. Ga.

Louisiana: *Ringgold v. Newkirk*, 3 Ark. 108 (under the civil law). In one case in Maryland, *Brooks v. Dent*, 1 Md. Ch. 526, but see *contra*.

Massachusetts: *Packard v. Richardson*, 17 Mass. 127; *Tenny v. Price*, 4 Pick. 387.

Mississippi: *Wren v. Pearce*, 4 Sm. & M. 91.

Missouri: *Bean v. Valle*, 2 Mo. 111; *Halsa v. Halsa*, 8 Mo. 305; *Ivory v. Murphy*, 36 Mo. 539; *Marié v. Garrison*, Report of T. W. Dwight, Referee, 56 (Mo. Law).

New Hampshire: *Lang v. Henry*, 54 N. H. 59.

North Carolina: *Ashford v. Robinson*, 8 Ired. 114; *Gardner v. King*, 2 Ired. Law, 300; *Miller v. Irvine*, 1 Dev. & Bat. 103.

Ohio: *Duckwall v. Rogers*, 15 Ohio St. 546; *Reed v. Evans*, 17 Ohio, 128.

Pennsylvania: *Paul v. Stackhouse*, 38 Pa. St. 306; *Bowser v. Cravener*, 56 Pa. St. 132; *Giltinan v. Strong*, 64 Pa. St. 245; *Hopkinson v. Davis*, 5 Phila. 148; *Shively v. Black*, 45 Pa. St. 347.

South Carolina: *Griffin v. Rembert*, 2 Rich., N. S. 414; *Woodward v. Pickett*, *Dudley* (S. Car.), 31, citing *Fyler v. Givens*; *Tindal v. Touchberry*, 3 Strobb. 178; *Fyler v. Givens*, *Riley's Law Cases*, 56; *McMorris v. Herndon*, 2 Bailey, 57; *Pope v. Fort*, 2 McMull.

of minds, and denied the peculiar force given to the word in *Wain v. Warlters*.⁽ⁿ⁾ The courts of Massachusetts displayed great deliberation in arriving at a conclusion upon the present question.^(o) In the earliest case the English rule was doubted; then the point was left open for future settlement,^(p) and finally the doubt was met and *Wain v. Warlters* expressly denied.^(q) In New Hampshire, as has been seen, an early case followed *Wain v. Warlters*, and in another case the point was not decided.^(r) But the later authority is against the English rule.^(s) In North Carolina the fullest case is that given below,^(t) and which denies *Wain v. Warlters*. In an early Ohio case the doctrine of *Wain v. Warlters* was said to be contrary to the earlier English rule, and the decision denied.^(u) In South Carolina the verbal distinctions on which *Wain v. Warlters* was rested have been repudiated, and "agreement" and "special promise" held to be interchangeably used in the

62; *Lecat v. Tavel*, 3 McCord (distinguishing *Stephens v. Winn*).

Tennessee: *Campbell v. Findley*, 3 Humphr. 332; *Taylor v. Ross*, 3 Yerg. 330; *Gilman v. Kibler*, 5 Humphr. 19; *State v. Humphreys*, 10 Humphr. 444; *Whitby v. Whitby*, 4 Sneed, 479.

Texas: *Ellett v. Britton*, 10 Tex. 210; *Fulton v. Robinson*, 55 Tex. 404.

Vermont: *Smith v. Ide*, 3 Vt. 299; *Patchin v. Swift*, 21 Vt. 297; *Sheehy v. Adarene*, 41 Vt. 541.

West Virginia: *Capehart v. Hale*, 6 W. Va. 550. This case could, however, rest on the statute, which says that the consideration need not be expressed (see Virginia, § 428).

(n) 6 Conn. 85, citing Lord Eldon as saying that *Wain v. Warlters* surprised the profession, and citing *Morris v. Stacey* and other cases.

(o) *Hunt v. Adams*, 5 Mass. 360.

(p) *Lent v. Padelford*, 10 Mass. 236; *Adams v. Bean*, 12 Mass. 139.

(q) *Packard v. Richardson*, 17 Mass. 129 (decided just before *Saunders v. Wakefield*), holding *Egerton v. Mathews* not consistent with *Wain v. Warl-*

ters, citing *Ulen v. Kittredge*, and saying that the Statute of Frauds had been in force in Massachusetts for a century, and never till lately had there been a suggestion of the necessity of stating the consideration.

(r) *Underwood v. Campbell*, *supra*; *Underhill v. Gibson*, 2 N. H. 358.

(s) *Lang v. Henry*, *supra*, and *Britton v. Angier*, 48 N. H. 422, citing *Dorman v. Bigelow* and other cases; distinguishing *Hodgkins v. Bond*, *Neelson v. Sanborne*, *Simons v. Steele*, and doubting *Underwood v. Campbell*. The word "promise" being used in the New Hampshire statute in conjunction with the word "agreement," i. e., "unless such promise or agreement," the court also relied on *Violett v. Patton* and *Colgin v. Henley*.

(t) *Miller v. Irvine*, 1 Dev. & Bat. 105, considering *Egerton v. Mathews* as inconsistent with *Wain v. Warlters*, citing *Leonard v. Vredenburg* and *Violett v. Patton*, and saying that the English rule was no older than 1804.

(u) *Reed v. Evans*, 17 Ohio, 133.

Statute of Frauds.(v) In an early case in Vermont(w) the word "agreement" was said to mean a special promise, and that the word "bargain" included the price; and *Wain v. Warlters* has also been denied by later authority.(x)

§ 428. The language of the various Statutes of Frauds is not uniform, and the phrase used to describe the contract is in some cases "promise," or "promise or agreement," and this difference from the phraseology of 29 Car. II. c. 3, has been made the excuse for not following *Wain v. Warlters*, and where the two words are used, it assumed that "agreement" means no more than "promise;" and while "agreement" includes a consideration, "promise" does not.(y) In Alabama, therefore, before 1849, the phrase used being "promise or agreement," it was held that the consideration need not be stated in the memorandum.(z) So in Florida.(a) In Illinois, where the word "promise" was used, the question was raised in an early case, but not decided.(b) In Kentucky, where the language of the Statute was the same, it was held that the consideration need not appear in the memorandum.(c) So in Mississippi, where the phrase is "promise or agreement."(d)

Rulings based on the difference between "promise" and "agreement."

(v) *Fyler v. Givens*, 3 Hill (S. Car.), 52, citing *Lecat v. Tavel* and the, *semble*, unreported case of *Perley v. Legare*, and the note to Day's edition of 5th East, distinguishing *Stephens v. Winn* as a case where there was, in fact, no consideration. There is a suggestion in *Fyler v. Givens* that, as to sales of land and agreements in consideration of marriage, the rule is different, and that the consideration must be expressed. But *quære* whether in such cases as in that of a sale of goods anything more is meant than that, if the whole contract is set out as required by the statute, the consideration must always appear. *Tindal v. Touchberry* decides that the memorandum need not express the consideration (the word "agreement" meaning no more than the word "promise"); so also *Griffin v. Rembert*, 2 Rich., N. S. 414 (admit-

ting that the rule in South Carolina was at one time the other way); see *Thomas v. Crofts*, 2 Richard. 117.

(w) *Ide v. Stanton*, 15 Vt. 689 (citing *Smith v. Ide*).

(x) *Sheehy v. Adarene*, 41 Vt. 541.

(y) *Patmor v. Haggard*, 78 Ill. 609 (under act of 1869); *Dorman v. Bigelow*, 1 Flor. 290 (Duv. Com. p. 206); *Marshall v. Lynn*, 5 M. & W. 116 (making the distinction between the 4th and 17th sections of 29 Car. II. c. 3).

(z) *Thompson v. Hall*, 16 Ala. 207, citing a number of cases; *Rigby v. Norwood*, 34 Ala. 132.

(a) *Dorman v. Bigelow*, 1 Flor. 290, doubting *Wain v. Warlters*.

(b) *Conolly v. Cottle*, Breese, 287.

(c) *Ratliffe v. Trout*, 6 J. J. Marsh. 606; see *Chichester v. Vass*, 1 Munf. 99.

(d) *Pearce v. Wren*, 4 Sm. & M. 97, citing cases.

So in New Hampshire,^(e) and see an early case in New York,^(f) and in Tennessee.^(g) In Texas, the phrase "promise or agreement" was not regarded as entitled to any distinctive force, and *Wain v. Warlters* was denied.^(h) And in Virginia the usual interpretation of the words in question prevails, and was originated, perhaps.⁽ⁱ⁾ The inutility of the rule of *Wain v. Warlters* has often been asserted, as many of the authorities already quoted will show, and that thought, quite as much as any view of the meaning of the words "agreement" or "promise" was doubtless in numerous instances the influence which induced a denial of the former English rule.^(j)

§ 429. What, under the rule which requires an expression in the memorandum of the consideration, is a sufficient expression, has been a question of no inconsiderable difficulty, and in some applications of it has been greatly disputed. As a general rule, it is enough that the consideration may be inferred, or spelt out from the memorandum, and it need not be explicitly stated.^(k) The rule was well stated by Erle, C. J., when he said that the consideration must appear "in the writing" containing the promise construed with the surrounding circumstances to be gathered therefrom, together with the

Manner of statement of consideration; can be implied.

(e) *Britton v. Angier*, 48 N. H. 422, citing cases.

(f) *Nelson v. Dubois*, 13 Johns. 175.

(g) *Campbell v. Findlay*, 3 Humph. 332; *Taylor v. Ross*, 3 Yerg. 331.

(h) *Ellett v. Britton*, 10 Tex. 209.

(i) *Violet v. Patton*, 5 Cranch. 151; *Colgin v. Henley*, 6 Leigh, 98; *Capehart v. Hale*, 6 W. Va. 550.

(j) See *Taylor on Evid.*, 5th ed. p. 888; see *Gerow v. Clark*, 9 U. C. Q. B. 223, following *Wain v. Warlters* reluctantly.

(k) *Bainbridge v. Wade*, 16 Ad. & Ell., N. S. 98; *Jarvis v. Wilkins*, 7 M. & W. 410; *Peate v. Dickens*, 5 Tyr. 124; 1 Cro., Mees. & R. 431; 3 Dowl. 177; *Clancy v. Piggott*, 4 N. & M. 502; 2 Ad. & Ell. 473; *Lang v. Neville*, 6 Jur.

217; *Powers v. Fowler*, 4 Ell. & Bl. 516; *Joint v. Mostyn*, 2 Fox & Sm. 8; *Bolling v. Munchus*, 65 Ala. 561; *Otis v. Haseltine*, 27 Cal. 82; *Tingley v. Cutler*, 7 Conn. 295; *Hargraves v. Cooke*, 15 Ga. 324; *Wilson Sewing Machine Co. v. Schnell*, 20 Minn. 40; *Hutton v. Padgett*, 26 Md. 231; *Orde-man v. Lawson*, 49 Md. 155; *O'Bannon v. Chumasero*, 3 Montana, 422; *Simons v. Steele*, 36 N. H. 73; *Laing v. Lee, Spencer*, 339. For a discussion of what is a sufficient statement of the consideration, so as to satisfy the Statute of Frauds, see *Forth v. Stanton*, 1 Saunders, 210; *Hamm. Theob. N. P.* p. 9 *et seq.*; II. Dan. on Negot. Inst. (2d ed.) p. 686; 1 McVey's Ohio Dig., p. 344, § 31.

averments on the record.(l) And, apart from the requirements of the Revised Statutes, the broad doctrine has been admitted even in New York.(m) And such was the law before the Revised Statutes, and since the act of 1863, repealing the provision therein relating to the present point.(n) In one case it was said that even under the Revised Statutes of 1830 the consideration could be inferred from the writing.(o) The whole of the consideration need not be stated, but a valuable consideration, or the fact of such a consideration, must be shown.(p) The court must be able, however, to ascertain, not merely a consideration, but *the* consideration of the contract.(q) Though the word "agreement," as used in the Statute of Frauds, is that which has been held to require the statement of the consideration, the word "agree," used in a memorandum, does not express the consideration;(r) but the opposite of this has been stated in a federal decision.(s) The interpretation must point directly to one result, and mere conjecture, however strong, is insufficient.(t) A false statement of the consideration has been held to satisfy the Statute of Frauds,(u) as where the consideration was recited to be a dollar paid, which, in fact, was not paid.(v)

§ 430. The words "value received" are a sufficient expression of the consideration.(w) A memorandum unsealed in the

(l) *Shadwell v. Shadwell*, 9 C. B. N. S. 173; see *Greenham v. Watt*, 25 U. C. Q. B. 369. kinson, 3 Jur. 405, where Lord Denman uses the language ascribed to him by Judge McLean.

(m) *Bennett v. Pratt*, 4 Denio, 276; (t) *Hawes v. Armstrong*, 1 Scott, 669; *McKensie v. Farrell*, 4 Bosw. 207; 1 Bingh. N. S., 765; 1 Hodges, 174; see *Church v. Brown*, 21 N. Y. 316; *Packer v. Willson*, 15 Wend. 346. *Wilson Sewing Machine Co. v. Schnell*, 20 Minn. 40, citing *Caballero v. Slater*.

(n) *Speyers v. Lambert*, 1 Sweeny, 338; *Castle v. Beardsley*, 10 Hun, 343; *Laws*, 1863, c. 464. (u) *Happe v. Stout*, 2 Cal. 460 (in point of fact, the consideration was not received).

(o) *Church v. Brown*, 21 N. Y. 316; (v) *Barnum v. Childs*, 11 Barb. 14; but see the above cases. 1 Sandf. Ch., 61.

(p) *Bolling v. Munchus*, 65 Ala. 561. (w) *Waddell v. McCabe*, 4 U. C. Q.

(q) *Raikes v. Todd*, 8 A. & Ell. 855. B., O. S. 191; 3 id. 502; *Violett*

(r) *Newcomb v. Clark*, 1 Denio, 228. *Patton*, 5 Cranch, 151; *Brooks v.*

(s) *How v. Kemball*, 2 McLean, 107, citing *Davies v. Wilkinson*, as stating that the words "I agree to pay" import a consideration; see *Davies v. Wil-* *Morgan*, 1 Harring. (Del.) 124; *Ede-*
len v. Gough, 5 Gill, 108; *Hutton v.*
Padgett, 26 Md. 228; *Jones v. Palmer*,
 1 Doug. (Mich.) 379; *Frank v. Irgens*,

form of a penal bond, and expressing to be for value received and binding the obligors to pay the debts of a third person to the obligee, is a sufficient memorandum as showing consideration.^(x) A promissory note stating the consideration to have been "value received" by my late husband; held to be sufficient, under the Statute of Frauds, whether the maker was administratrix or not.^(y) The words "value received" are not conclusive, and therefore where the evidence shows that the benefit of the consideration all went to a third person, the obligee was not allowed to recover.^(z) The word "convey" is not equivalent to "sell," and does not import a consideration; the memorandum was: "I have this day conveyed a note of J. E. S., which note I hold myself accountable for the payment thereof."^(a) A promissory note and commercial paper generally import a consideration, and need therefore express none.^(b) Whether a note or bill has the words "value received" is not important.^(c) Parol evidence is admissible to show the consideration of a promissory note, and this though such consideration was an oral contract within the Statute of Frauds.^(d)

27 Minn. 43; *Marshall v. Cobleigh*, 18 N. H. 492; *Leonard v. Vredenburg*, 8 Johns. 37; *Howard v. Holbrook*, 9 Bosw. 240; *Cooper v. Dedrick*, 22 Barb. 516; *Watson v. McLaren*, 19 Wend. 563; *Douglas v. Howland*, 24 Wend. 40; *Brewster v. Silence*, 4 Seld. 207; *Church v. Brown*, 21 N. Y. 316; *Moore v. Cross*, 19 Law Reporter, 673; *Miller v. Cook*, 23 N. Y. 495; *Moster v. Hotchkiss*, 3 Abb. App. Dec. 326; *Leonard v. Sweetzer*, 16 Ohio, 4; *Sidle v. Anderson*, 45 Penna. St. 464; *Woodward v. Pickett*, *Dudley*, Dig. So. Car. 31; *McMorris v. Herndon*, 2 Bailey, 57; *Aikin v. Duren*, 2 N. & McC. 371; *Caldwell v. McKain*, id. 555; *Legare v. Potter*, 1 Rice, So. Car. 362 (but until then (1825) the point had been in doubt); *National Bank v. Kinner*, 1 Utah, 102; *Ellett v. Britton*, 10 Tex. 209; *Lapham v. Barrett*, 1 Vt. 252 (a case not under the Statute of Frauds);

Day v. Elmore, 4 Wis. 190; *Cheney v. Cook*, 7 Wis. 423; *Dahlman v. Hammel*, 45 Wis. 468.

(x) *Aikin v. Duren*, 2 N. & McC. 371.

(y) *Ridout v. Bristow*, 1 Cr. & J. 231.

(z) *Lines v. Smith*, 4 Flor. 47, citing cases; and see *Wyman v. Gray*, 7 H. & Johns, 415, where the defence was rested on the Statute of Frauds; *Sumralt v. Ridgely*, 20 Md. 116.

(a) *Spicer v. Norton*, 13 Barb. 545.

(b) 1 Daniel on Negot. Inst., p. 94, etc. (2d ed.), 137 *et seq.*; *Wait's Act. and Def.*, pp. 563, 608; *Thompson v. Armstrong*, 5 Ala. 387; *Townsend v. Derby*, 3 Metc. (Mass.) 364.

(c) *Cook v. Gray*, *Hempstead*, 84; see 1 Dan. on Neg. Inst., p. 94 (2d ed.).

(d) *Edgerton v. Edgerton*, 8 Conn. 10; but, *semble*, according to *Sackett v. Palmer*, 25 Barb. 179, such proof would defeat recovery.

§ 431. A seal is a sufficient substitute for the expression of consideration.(e) Thus, a bond for consideration of blank dollars is good.(f) It was suggested that under the Revised Statutes of New York a seal was not a sufficient expression of the consideration, but that an explicit statement was necessary;(g) and where an order for money was sealed, and thereby rendered non-negotiable, it was held in Pennsylvania that a seal was no proof of consideration so as to show an obligation in the drawer to pay the amount of the order to the payee.(h) Parol evidence has been held admissible to show that no consideration was agreed to be paid under a contract evidenced by a specialty;(i) and this is the rule under the California law ranking together parol writings and specialties.(j) In some states any promissory writing, whether sealed or not, imports a consideration.(k) So in Tennessee.(l) An agreement, showing mutual promises, sufficiently expresses the consid-

The effect of a seal; commercial paper; whether writing imports a consideration.

(e) *Gregory v. Logan*, 7 Blackf. 112; *Steadman v. Guthrie*, 4 Metc. (Ky.) 152; *Edelen v. Gough*, 5 Gill, 103; *Hutton v. Padgett*, 26 Md. 228; *Mitchell v. McCleary*, 42 Md. 377, citing *Nabb v. Koontz*; *Jones v. Palmer*, 1 Doug. (Mich) 379; *Livingston v. Tremper*, 4 Johns. 416; *Leonard v. Vredenburg*, 8 Johns. 37; *Kerr v. Shaw*, 13 John. 236; *Watson v. McLaren*, 19 Wend. 563; *Cooper v. Dedrick*, 22 Barb. 516; *Bush v. Stevens*, 24 Wend. 257; *Douglas v. Howland*, 24 Wend. 40; *Burrell v. Root*, 40 N. Y. (1 Hand), 496; *Howard v. Holbrook*, 9 Bosw. 240; *McKensie v. Farrell*, 4 Bosw. 207; *Mosher v. Hotchkiss*, 3 Abb. App. Dec. 326; *Miller v. Cook*, 23 N. Y. 495; *Rosenbaum v. Gunter*, 2 E. D. Smith, 416; *Brewster v. Silence*, 4 Seld. 207; *Day v. Elmore*, 4 Wis. 190.

(f) *Whitby v. Whitby*, 4 Sneed. 473.

(g) *Rogers v. Kneeland*, 13 Wend. 121; see *Baker v. Cornwall*, 4 Cal. 16.

(h) *Sidle v. Anderson*, 45 Pa. St. 464. (i) *Childs v. Barnum*, 11 Barb. 14; 1 Sandf. 61.

(j) *Comstock v. Breed*, 12 Cal. 288. (k) *Iowa: Jones v. Berryhill*, 25 Iowa, 297; *Sabin v. Harris*, 12 Iowa, 88; *Linder v. Lake*, 6 Iowa, 167; *Henderson v. Booth*, 11 Iowa, 214; Code, 1851, § 975; Code, 1860, § 1824; Code, 1873, § 2113.

Kentucky: A writing under the Revised Statutes (ch. 22, § 2) of Kentucky and the previous laws imports a consideration, and ranks a specialty; a consideration need not, therefore, under the Statute of Frauds be expressed; *Steadman v. Guthrie*, 4 Metc. (Ky.) 152.

Kansas: *Fuller v. Scott*, 8 Kan. 32 (an endorsement by a stranger to a note); *Waynick v. Richmond*, 11 Kan. 493.

Missouri: *Caples v. Branham*, 20 Mo. 247.

(l) State (1871), § 1805.

eration.(m) And where the memorandum recites what the party seeking to charge is to do under the contract, the latter assumption will be taken to be the consideration of the defendant's promise, and the Statute of Frauds will be satisfied.(n)

§ 432. With every step that is taken the difficulties of the subject before us increase, and the cost, vexation, and injustice which must have resulted from the vast litigation represented by the cases now about to be considered, are sufficient reasons for dispensing by express legislation, where such a rule prevails, with the necessity of stating in the memorandum required by the Statute of Frauds the consideration of the contract. It is in the case of guaranties that any attempt to reconcile the numerous and contradictory decisions is the most unsatisfactory. In order to ascertain what principle they have in common we must observe that the first object of inquiry in nearly every instance is, whether the promisee relied upon the defendant's guaranty when the transaction with the party answered for was entered into. The following is a category of memoranda sufficient because they showed such a reliance: A written guaranty of A.'s purchases, stating A. is about to buy.(o) So "I guarantee the payment of any goods J. Stadt" (the plaintiff) "delivers to J. Nichols."(p) So "I will be responsible for the purchase of goods from W. S. & Co., etc., for H. C. D., etc.," as referring to future sales.(q) So "as Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account."(r) A

Memo-
randa of
guaranty;
where
memoran-
dum shows
that the
promisee
relied on
guaranty.

(m) *Murphy v. Rooney* 45 Cal. 78; *Thompson v. Blanchard*, 3 Comst. 335.

(n) *Weldin v. Porter*, 4 *Houst.* 249.

(o) *Benedict v. Sherill*, *Hill & Denio*, 219.

(p) *Stadt v. Lill*, 9 *East*, 348; *S. C.*, *sub nom.*, *Stapp v. Lill*, 1 *Camp.* 242.

(q) *Williams v. Ketchum*, 19 *Wis.* 231.

(r) *Hoad v. Grace*, 7 *H. & N.* 496; 31 *L. J. Exch.*, 98.

Where the declaration averred that the plaintiff had agreed to sell goods to L. if the defendant would guarantee L., and that before the goods were delivered, or L. indebted to the plaintiff, the defendant having notice of these facts wrote: "I hereby guaranty the payment of any sums, etc., due to you from L., etc.;" it was held on a demurrer that it must be taken that the guaranty was on the consideration of the

guaranty in writing, which is of certain material, to be put into the hands of a third person to manufacture shows a consideration.^(s) And where, on a receipt stating that the signers had received certain railway stock in order to raise money therefrom and promising to return the stock, the defendants, the officers, and directors of the railway wrote a guaranty of the promise contained in the "above obligation," it was held that the consideration sufficiently appeared.^(t) A guaranty of what stock a person has had or may want is sufficient.^(u) A note addressed by the defendant, and another to the plaintiff, as follows: "We hold ourselves responsible, etc., for, etc., not exceeding \$500, which Mr. C. H. Woodruff may require of your bank for legitimate business purposes," shows a sufficient consideration.^(v) An extreme instance of the anxiety with which courts will sometimes extort a consideration from the expressions of a writing is the following: An uncle wrote his nephew, "I am glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, etc., I will pay to you £150 yearly during life, and until, etc.; and it was held that the marriage was the consideration; and the nephew acting upon the above promise the uncle was bound.^(w) A guaranty of rent written on a lease, and in consideration thereof, is sufficient;^(x) so a guaranty of rent if the owner will

future advance to L., and that therefore the Statute of Frauds was satisfied; *Bainbridge v. Wade*, 16 Q. B. 98, distinguishing *Raikes v. Todd*; see *Evoy v. Tewksbury*, *infra*.

(s) *Marquand v. Hipper*, 12 Wend. 521.

(t) *Simons v. Steele*, 36 N. H. 82.

(u) *Gates v. McKee*, 3 Kern. 238. Speaking of a defendant the court, in another case, said: "He writes that, etc., the original debtors had sold to him their stock of goods, and quoting the defendant's letter, I intend to job off the stock at the least possible expense, and hope to make considerable out of it. My intention is to make the most of it for the creditors, and you may consider me as security and endorser

for the amount owing you by J. P. Freeman & Co." (the original debtors). Added, "The consideration of the defendant's engagement or guaranty, although not stated in express terms, may fairly be inferred to be the sale of their stock of goods to him;" *Laing v. Lee, Spencer*, 339.

(v) *(City) Bank v. Phelps*, 86 N. Y. 489.

(w) *Shadwell v. Shadwell*, 9 C. B., N. S. 159; 30 L. J. C. P., 145; 7 Jur., N. S. 311 (Byles, J., dissented and urged strong reasons for doing so).

(x) *Newcomb v. Clark*, 1 Denio, 228 ("house hired of you by," etc.); *Adams v. Beans*, 12 Mass. 139; *McKensie v. Farrell*, 4 Bosw. 207.

lease to a particular person.(y) Where the declaration avers that a guaranty, as follows: "I hereby agree to pay the rent stipulated above, etc., provided the said, etc., does not pay it," was executed at the same time with, and was the consideration for making the lease, the Statute of Frauds is complied with.(z) Where M. & Co. wrote the defendant to pay the plaintiff a certain indemnity because he had been sued for a breach of warranty of goods, which he had sold on account of M. & Co., the defendant wrote that he would promptly comply with the written order, and the latter was delivered to the plaintiff, who remitted to M. & Co. the proceeds of sales made on their account and defended the suit, it was held that the defendant's acceptance, taken with the request, showed the consideration; *i. e.*, the defence, by the plaintiff, of the suit in which he was then engaged.(a) A guaranty of a note on a written request to renew it shows the consideration through the written request.(b)

§ 433. The fact that the guaranty and the contract answered for are contemporaneous, is an important one as raising a presumption that the promisee in the latter gives credit to the promissor in reliance upon the

The rule as to guaranty contemporaneous

(y) *Waterbury v. Graham*, 4 Sandf. 215.

In a New York case, decided since 1863, the evidence showed that before renting the premises the plaintiff required security for the rent; Mrs. Marshall proposed the name of the defendant; a lease was drawn up which bears date April 6, 1867, and which it was assumed was signed, etc., by her on that day; the plaintiff, however, before executing it, etc., called upon the defendant in relation to the security, and the defendant thereupon, in the presence of the plaintiff, etc., executed an agreement in writing and delivered the same to the plaintiff: "The house you have rented to Mrs. A. B. Marshall I agree herewith to hold myself responsible for the payment of the monthly rent, say \$400 per month;" and the

memorandum was held sufficient; *Speyers v. Lambert*, 1 Sweeny, 338.

(z) *Evoy v. Tewksbury*, 5 Cal. 286; see *Otis v. Haseltine*, 27 Cal. 82; see *Bainbridge v. Wade*, *supra*, as to the effect of the pleading.

(a) *Rogers v. Kneeland*, 13 Wend. 121; S. C., 10 Wend. 219.

A memorandum stating that the defendant had received from plaintiffs the deed of certain land sold by them, the plaintiffs, to one J. B., reciting this sale, and concluding "I hereby promise and engage to see above contract and promise fulfilled," signed by defendant, is good under the Statute of Frauds as showing consideration; *i. e.*, *inter alia*, the delivery of the deed; *Stymets v. Brooks*, 10 Wend. 207.

(b) *Sloan v. Wilson*, 4 Harr. & J. 322.

former. The following are examples of memoranda regarded for this reason as sufficiently showing the consideration.^(c) In a late Maryland case the court said, that “of the undertakings within this provision of the Statute of Frauds, there are two classes which should be carefully discriminated, the one from the other. In the first are cases in which the guaranty or promise is collateral to the principal contract, but is made *at the same time*, and becomes an essential ground of the credit given to the principal debtor. In such case there is not, nor need be, any other consideration than that moving between the creditor and the original debtor. And in the second class are cases in which the collateral undertaking is subsequent to the creation of the debt, and is not the inducement thereto, although the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. In this case there must be some further consideration shown, having an immediate respect to such liability, as the consideration for the original debt will not attach to the subsequent collateral promise.”^(d) It has been said that, while the contemporaneity of a guaranty and of the promise guaranteed does not make the former any the less a guaranty, yet the consideration of the original promise may enure to the guaranty.^(e) A guaranty of future drafts to be accepted and of past acceptances shows the consideration sufficiently.^(f) So a guaranty to hold harmless for any endorsement “you may make for,” etc.^(g) An agreement to accept and pay drafts drawn by certain persons, and negotiated through “your bank,” is a good guaranty of drafts issued under the credit.^(h) Where the defendant wrote the plaintiffs, inclosing an accepted bill, and guaranteeing it, it was held that the consideration appeared, viz., that the plaintiffs would take such

with obligation guaranteed; valid memoranda.

(c) *Fugate v. Hansford*, 3 Litt. 262; *Ordeман v. Lawson*, 49 Md. 155; *Marsh v. Chamberlain*, 2 Lans. 293; *Gillighan v. Boardman*, 29 Me. 80; *Crane v. Bullock*, R. M. Charl. 319; *Lehman v. Levy*, 69 Ala. 49.

(d) *Culbertson v. Smith*, 52 Md. 634, citing several cases, and saying that, under the first of the above classes,

come *Nabb v. Kountz*, and *Mitchell v. McCleary*.

(e) *Mizner v. Spier*, 13 Lanc. Bar, 78; 96 Pa. St., 533.

(f) *Hutton v. Padgett*, 26 Md. 228.

(g) *Staats v. Howlett*, 4 Denio, 566.

(h) *Union Bank v. Coster*, 1 Sandf. 563. See *Lecat v. Tavel*, 3 McCord, 158.

bill.(i) A written guaranty "of a note endorsed by" does not sufficiently identify it so as to make the consideration of the latter support the former.(j) The words "I guarantee," endorsed on a promissory note, will, in Michigan, be presumed to be contemporaneous, and to be upon the consideration of the note, and so the Statute of Frauds is satisfied.(k) So a promise to be responsible for goods ordered by a third person, endorsed on the latter's contract of purchase, and contemporaneous therewith.(l) If the plaintiff takes the note with the endorsement then on it, he must be supposed to trust the endorser, and this is a sufficient consideration for the latter's promise.(m) In another Massachusetts case it was said, "when the guaranty is made on the note before its delivery by the maker to the promisee, it must be deemed to be done for the benefit of the maker to add to the strength of the note, and to induce the promisee to take it and advance his money on it, and no other consideration is necessary than the credit thus given to the maker. And the guaranty being without date, and there being no direct proof of any time at which it was made we think the court were right in leaving it to the jury to find that the guaranty was simultaneous with the note itself."(n)

(i) *Boehm v. Campbell*, 8 Taunt. 681.

(j) *Ordeman v. Lawson*, 49 Md. 155, citing cases.

(k) *Higgins v. Watson*, 1 Mich. 429. See *Ordeman v. Lawson*, 49 Md. 155.

(l) *Church v. Brown*, 21 N. Y. 315.

(m) *Hunt v. Adams*, 5 Mass. 360.

(n) *Bickford v. Gibbs*, 8 Cush. 156; see, however, *Deutsch v. Bond*, 46 Md. 168, citing *Aldridge v. Turner*. And where the vendor of goods, who has taken a note for the price, finding that there has been a fraud in the matter, is about to rescind the sale, and take back the chattel sold, is induced not to do so by the defendant's promise to be answerable for the price, and the defendant endorses the note, "Security, George H. Kiersted;" the Statute of Frauds is satisfied; *Harwood v. Kiersted*, 20 Ill. 373.

The following statement in the pleadings does not show that the consideration was sufficiently expressed in the memorandum. After the execution of the note, and before its delivery to the payee, and for the purpose of giving said note additional credit, and in consideration of the sale and delivery of said goods by Stanley to Ellsworth, defendants, with the intention of giving said note security and original validity, endorsed and signed said note on the back as follows: "We, the undersigned, jointly guaranty the payment of the within note." [Signed by the defendants.] After the execution and endorsement of the said note as aforesaid, and in consideration of the sale and delivery of said goods to Ellsworth by said Stanley, the note was delivered to the payee, who afterwards

The rule now under consideration is sometimes stated in another way, and the consideration of the guaranty is assumed to be that of the contemporaneous contract. Thus, two contracts executed contemporaneously were held to show the one the consideration of the other, though there was no reference by one to the other; the one was a contract of sale by the plaintiff to the defendants as agents for one T. of certain chattels; the other a guaranty by the defendants of the fulfilment by T. of his part of the contract.(o) In another California case it was said that the consideration of the guaranty of a note must be that passing between the maker and the payee of the note, and it was held that where a defendant three days after a sale, made on the faith of his verbal promise to guarantee, endorsed a note for the price as follows, "I guaranty the payment of the within note," it was held that the memorandum was sufficient.(p) In a Pennsylvania case both of these modes of viewing the transaction were taken, and the court said, "Where the guaranty or promise, though collateral to the principal contract, is made at the same time with the principal contract, and becomes an essential ground of the credit given to the principal debtor, the whole is one original and entire transaction, and the consideration extends and sustains the promise of the principal debtor and also of the guarantor. No other consideration need be shown than that for the original agreement upon which the whole debt rested. There is no date to the guaranty; the writing, therefore, imported on the face of it an original and entire transaction, for a guaranty of the contract implies, *ex vi termini*, that it was a concurrent act and part of the original agreement."(q) In a Wisconsin case

assigned and transferred the instrument for value to the plaintiff, who is the lawful owner and holder thereof, and of the indebtedness secured thereby; *Parry v. Spike*, 49 Wis. 387.

(o) *Jones v. Post*, 6 Cal. 104; see *Dorman v. Bigelow*, 1 Flor. 290; *Gilligan v. Boardman*, 29 Me. 80.

(p) *Howland v. Aitch*, 38 Cal. 135; see *Casey v. Brabason*, 10 Abb. Pr. 368; a surety, signing a note as principal, cannot object that the consideration

does not appear; that moving between the other principal and the payee is enough.

(q) *Snevily v. Johnson*, 1 W. & S. 309 (there was no question as to the effect of the Statute of Frauds, as parol guaranties were good at the date of the decision, and as it has never been necessary in Pennsylvania that the memorandum should express the consideration; *Leonard v. Vredenburg*, *D'Wolf v. Rabaud*, and other New York

the contemporaneous test appears to have been disregarded, and where the defendant signed with the tenant of land a written contract by which the tenant agreed to assume the duties of a tenant, and the defendant agreed to become security for the prompt payment of the rent, and the entire paper was subscribed by both parties, it was held that no consideration appeared, and that the Statute of Frauds applied.^(r) The New York cases of contemporaneous guaranties will be found in § 434. Where an endorsed guaranty expressly refers to the contract endorsed in such terms as to identify it, the whole will be treated as one transaction upon a common consideration,^(s) and especially where the two engagements are contemporaneous.^(t) A blank endorsement of a note afterwards filled up as a guaranty sufficiently shows the consideration.^(u) An endorsement made on a note by a stranger thereto was treated as a guaranty, and was held in California to show the consideration sufficiently.^(v) Where the guaranty of a note is given by the assignor of the latter, the consideration appears, viz., the acceptance of the note in reliance upon the guaranty.^(w)

authorities cited. In *Crane v. Bullock*, R. M. Charlton's Rep. 319, it was said that the guaranty must have a consideration of its own, and that of the contract guarantied will not enure to support it.

(r) *Hutson v. Field*, 6 Wis. 408.

(s) *Stead v. Liddard*, 1 Bingham 196; 8 Moore, 2.

(t) *Nabb v. Koontz*, 17 Md. 283 (distinguishing *Aldridge v. Turner*, as a subsequent guaranty), and citing many cases.

(u) *Fuller v. Scott*, 8 Kan. 32; see *Ulen v. Kittredge*, 7 Mass. 235. A promise endorsed on another written promise is to the same effect, does not make the former a guaranty of the latter; *Carver v. Warren*, 5 Mass. 546.

(v) *Riggs v. Waldo*, 2 Cal. 486; see, *supra*, *Van Doren v. Tjader*, 1 Nev. 388; see *Hall v. Newcomb*, 7 Hill, 417; *Moore v. Cross*, 19 Law Reporter, 673.

(w) *How v. Kemball*, 2 McLean, 103;

see *Hanford v. Rogers*, 11 Barb. 19 (the assignment of a mortgage); *Brown v. Curtiss*, 2 Comst. 233; *Durham v. Manrow*, 2 Comst. 537; but see *Johnson v. Gilbert*, 4 Hill, 178.

Where the plaintiff was offered in payment of money due certain drafts which he refused to take unless the defendant would endorse them, which the latter would not do, but wrote this letter: "I herewith hand you drafts, drawn by, etc. etc., and accepted by, etc. etc., and endorsed by, etc., and should the bills not be honored when due, I promise to see that they do so," *Gibbs, C. J.*, said of the memorandum, "it is sufficient. It appears on the face of the letter that, in consideration that the plaintiff would take the note, the defendants would indemnify him;" *Morris v. Stacey*, 1 F. L. Holt, 153, distinguishing *Wain v. Warlters*; see long note by the reporter.

The application of this principle has been limited in at least one case, and where the defendant, as agent for the plaintiff, sold R. certain goods and took notes for the price in his own name, and on them wrote a guaranty of their collection, it was held that, inasmuch as the defendant never treated the notes as his, but only as the plaintiff's, and as the debt was evidently due to the latter alone, the defendant's promise was a plain guaranty, and the consideration of it not being expressed, the Statute of Frauds applied.(x) In a case which was by analogy the converse of this, on the notes in suit, the defendant endorsed as follows: "Having purchased the land mortgaged to secure the note, I hereby guaranty, etc., the payment of the same," and this was held not to be sufficient evidence of consideration; the endorsement did not say that, as part of the consideration of its purchase, the defendant had assumed to pay the notes.(y)

§ 434. One of the most confused chapters in the history of the present branch of our subject is that in which is contained the New York decisions on the question as to whether the consideration expressed in a written contract is to be regarded as forming a part of a guaranty endorsed on the latter. The state of the law has been well summed up in the statement that "If the decision of this appeal depended upon the inquiry, what is to be deemed the law of this state in regard to the necessity of expressing a consideration in an endorsement without seal upon an agreement by which the performance of the latter is guaranteed; and if for this purpose it was necessary to harmonize the decisions from *Packer v. Willson*, 15 Wend. 343, down to *Manrow v. Durham*, 2 Comst. 583, *Hall v. Farmer*, id. 553, *Brown v. Curtiss*, id. 225, we might well despair of attaining a satisfactory result."(z) And while the law even to-day remains unsettled, it may be said that the weight of authority is in favor of holding: *First*. That a guaranty of the performance of another con-

The New York decisions as to whether contemporaneous written contracts show a consideration.

(x) *Nichols v. Allen*, 22 Minn. 283.

(z) *Rosenbaum v. Gunter*, 2 E. D.

(y) *Parkman v. Brewster*, 15 Gray, Smith, 416, per Woodruff, J.

273 (a case not under the Statute of Frauds).

tract endorsed upon the writing containing the latter will, if contemporaneous therewith, be taken with it as forming one document, so that the consideration expressed in the original agreement will be treated as that of the guaranty.^(a) But opposed to this is the array of cases given in the note.^(b) *Secondly*. That a memorandum of guaranty, such as is described

(a) *Leonard v. Vredenburg*, 8 Johns. 37; *Nelson v. Dubois*, 13 id. 175; *Bailey v. Freeman*, 11 Johns. 223; *Lequeer v. Prosser*, 1 Hill, 257; *Wheelwright v. Moore*, 1 Hall, 652, 201; *Union Bank v. Coster*, 1 Sandf. 565; *Brown v. Curtiss*, 2 Comst. 233; *Durham v. Manrow*, id. 537; *Tyler v. Stevens*, 11 Barb. 486; *Moore v. Cross*, 19 Law Reporter (Supreme Court N. Y., G. T.) 673; *Church v. Brown*, 21 N. Y. 316; *Dunning v. Roberts*, 35 Barb. 468; *Marsh v. Chamberlain*, 2 Lans. 293; *Enos v. Thomas*, 4 How. Pr. 50; see, also, *Wilson, etc., Co. v. Schnell*, 20 Minn. 40; *Hazeltine v. Larco*, 7 Cal. 33; see Sm. L. C. (7th Am. ed.), ii., p. 259; Story on Notes, § 467-480.

(b) *Hunt v. Brown*, 5 Hill, 145; *Spies v. Gilmore*, 1 Comst. 321; *Hall v. Farmer*, 2 Comst. 557; *De Ridder v. Schermerhorn*, 10 Barb. 640; *Brewster v. Silence*, 4 Seld. 207; *Glen Cove Ins. Co. v. Harrold*, 20 Barb. 301 (following *Brewster v. Silence* unwillingly); *Gould v. Moring*, 28 Barb. 444 (*semble* the memorandum in this case showed the consideration to be past); *Draper v. Snow*, 20 N. Y. 331 (with, however, an important qualification, see *infra*); see *Van Doren v. Tjader*, 1 Nev. 388.

Of the cases above given two call for a more detailed notice; these are *Durham v. Manrow* (below, *Manrow v. Durham*), and *Brown v. Curtiss*. In the first of these all that relates to the present point is in the form of *dicta*, more or less conflicting; four judges who made up the majority of the court

thought that the contract evidenced by the endorsed promissory note was an original one, and not within the Statute of Frauds; three judges dissented; the reasons given for the same result in the court below were not disposed of, and whether the endorsement was available as in itself such a promissory note as would imply a consideration, though the ground of the decision below was neither affirmed nor denied above. *Bronson, J.*, dissented from the ruling of the court below, and relied mainly on the point that the guaranty was subsequent to the making of the note guaranteed. *Brown v. Curtiss* appears in an even more questionable shape: two of the judges thought that the contract was within the Statute of Frauds. *Bronson, J.*, thought not, but admitted that the memorandum was insufficient. *Strong, J.*, thought the memorandum was insufficient only because subsequent to the primary promise, and agreed with Judge *Bronson* that the Statute of Frauds did not apply to the contract under which the note was given. So by a divided court the judgment below was affirmed.

A qualification of the test of coincidence in time was made in one of the later New York cases, in which it was said (*Draper v. Snow*, 20 N. Y. 331) that while, if the parties are the same, both the primary agreement and the guaranty may be considered as forming one contract; the rule would be otherwise if the two promises were made merely to the same person.

in the first proposition, will not be considered as sufficient if made subsequently to the promise answered for.(c) *Thirdly*. That guaranties on commercial paper form a class by themselves, and may be sustained on special grounds.(d) The cases in the note below deny proposition second, but regard guaranties as negotiable instruments;(e) and the same principle was carried further in some earlier cases, which are, however, no longer law. Thus, in *Lequeer v. Prosser*,(f) it was held that an endorsement made upon a promissory note at or before the time of its delivery created the relation of surety to the principal, or that of a joint and several maker. And in *Leggett v. Raymond*(g) a subsequent endorsement of a guaranty was held to create the liability of an endorser. In *Manrow v. Durham*, reversed above, the guaranty endorsed on the note was considered as being itself a promissory note. In *Hunt v. Brown*(h) it was admitted that a guaranty of payment was a promissory note, and on this ground *Manrow v. Durham*(i) was distinguished. In *Oakley v. Boorman*(j) it was held that a subsequent endorsement of a note by a stranger to it created the liability of an endorser, because there was an implied authority to the holder to write over the signature a guaranty in which might be expressed the consideration. In *Spies v. Gilmore*, and *Hall v. Newcomb*,(k) it was held an endorsement by a

(c) *Durham v. Manrow*, 2 Comst. 537; *Brown v. Curtiss*, 2 Comst. 233; *Tyler v. Stevens*, 11 Barb. 486; *Packer v. Willson*, 15 Wend. 346; *Johnson v. Gilbert*, 4 Hill, 178; *Spicer v. Norton*, 13 Barb. 545; *Bennett v. Pratt*, 4 Denio, 276; *Wood v. Wheelock*, 25 Barb. 626; *Wilson v. Roberts*, 5 Bosw. 107; *Taylor v. Pratt*, 3 Wis. 692 (the date of the guaranty as given in the report may be a misprint).

(d) *Bennett v. Pratt*, 4 Denio, 276.

(e) *Leggett v. Raymond*, 6 Hill, 641; *O'Donnell v. Smith*, 2 E. D. Smith, 124; see *Howland v. Aitch*, 38 Cal. 135.

O'Donnell v. Smith was as follows: A debtor, underneath a bill rendered him by his creditor, drew an order upon

the defendant: "Please pay the above and charge to the account of." . . The defendant wrote when he saw it: "I promise to pay the above." And it was held that it was a bill of exchange not within the Statute of Frauds, nor void for want of consideration expressed.

(f) *Supra*.

(g) *Supra* (Bronson, J., who delivered the opinion, dissented therefrom).

(h) *Supra*; but see *Durham v. Manrow*, *supra*.

(i) *Supra*; and see *Spicer v. Norton*, 13 Barb. 543.

(j) 21 Wend., 590; denied in *Brewster v. Silence*.

(k) 7 Hill, 417, affirming 3 Hill, 234, and denying *Nelson v. Dubois*.

stranger gave rise to a liability as endorser, but not to that of maker or guarantor. The view of the relation between the parties to commercial paper, which was adopted in *Lequeer v. Prosser* and *Leggett v. Raymond*, has since been repudiated, and the dispute shifted to the other ground, viz., the contemporaneity of the guaranty, and the engagement guaranteed. *Hall v. Farmer*,^(l) conflicting and unsatisfactory as are the opinions expressed therein, seems to be clear on the point that a guaranty endorsed on a promissory note does not, under the commercial law, imply a consideration, as would the note itself. *Brewster v. Silence*^(m) is the most positive decision on the point, and holds that *Manrow v. Durham*, *Lequeer v. Prosser*, *Oakley v. Boorman*, are no longer law since *Brown v. Curtiss*, *Spies v. Gilmore*, and *Hall v. Newcomb*. An early case seems also inconsistent with *Lequeer v. Prosser*.⁽ⁿ⁾ When the guaranty and the promise answered for are contemporaneous, the former is supported on a general ground, which applies to all contracts, and derives no peculiar support from the fact that in a given instance the guaranty is evidenced by an endorsement of a piece of commercial paper.

§ 435. In the note below will be found examples of guaranties endorsed on promissory notes at or before the delivery of the latter, and sustained as showing the consideration sufficiently.^(o) In the following note are given examples of guaranties of the same description, but decided not to be sufficiently evidenced under the Statute of Frauds.^(p) A distinction was formerly

Example of guaranties of promissory notes under the New York rule.

(l) 2 Comst., 557 (one of the judges thought that the evidence showed that there was in fact no consideration); see *De Ridder v. Schermerhorn*, 10 Barb. 640.

(m) 4 Seld., 207; see Spencer's opinion in *Durham v. Manrow*, *supra*, and Bronson's in *Brown v. Curtiss*, *supra*; see *Draper v. Snow*, 20 N. Y. 333; *Wood v. Wheelock*, 25 Barb. 626; see *Taylor v. Pratt*, 3 Wis. 692.

(n) *Johnson v. Gilbert*, 4 Hill, 178.

(o) *Leonard v. Vredenburg*, 8 Johns. 37; *Wheelwright v. Moore*, 1 Hall. 652;

Lequeer v. Prosser, 1 Hill, 257; *Union Bank v. Coster*, 1 Sandf. 565; *Moore v. Cross*, 19 Law Reporter, 673 (Supreme Court, N. Y. G. T.). See *Hazeltine v. Larco*, 7 Cal. 33 (in which it was said that the guaranty, though not good as an endorsement under the commercial law, was a sufficient memorandum under the Statute of Frauds); *Howland v. Aitch*, 38 Cal. 135.

(p) *Hall v. Farmer*, 2 Comst. 557; *Brewster v. Silence*, 4 Seld. 207; *Glen Cove Insurance Co. v. Harrold*, 20 Barb. 301 (following *Brewster v. Silence* un-

made between a guaranty of the collection of a note and a guaranty of the payment, it being held that a promise of the latter class, if endorsed on a promissory note, imported a consideration, while one of the former class did not. But, since *Brewster v. Silence*,^(q) this point is of no value, inasmuch as both classes are equally within the Statute of Frauds.

§ 436. There remain for consideration a few cases of ordinary written contracts not negotiable in character in which the reference of the guaranty to the promise answered for appeared with sufficient clearness to enable the court to say that the consideration expressed in the latter was that of the former also.

Example of memoranda sufficiently showing the consideration.

The most important of these decisions was that in which the facts were as follows:^(r) The defendant wrote this guaranty upon the paper containing a contract contemporaneously entered into: "I will be responsible for all such goods as Mr. White shall buy of the Messrs. Church within one year from date, and which shall be paid for according to the terms of the written contract;" and the written contract thus guaranteed provided for future sales by Church, the plaintiff, to White, the person answered for. It was held that the Statute of Frauds was satisfied. An undertaking written at the foot of a contract of sale of chattels, and contemporaneous with it, guaranteeing "a full and perfect performance," etc., on the part of the vendor, the defendant, shows the consideration sufficiently.^(s) In a California case, where the memorandum was, "I hereby guaranty the fulfilment of the within charter," was held suffi-

willingly). See *Van Doren v. Tjader*, 1 Nev. 388. In *Hunt v. Brown*, 5 Hill, 145, it was held that the endorsed guaranty did not show any consideration, but admitted, as we have already seen, that, had the guaranty been of the payment of the note, and not merely of its collection, the endorsement might have been sustained as in effect a promissory note. This distinction was recognized in *Spicer v. Norton*, 13 Barb. 543; *Tyler v. Stevens*, 11 Barb. 486.

(q) *Hunt v. Brown*, 5 Hill, 145;

Burt v. Horner, 5 Barb. 503; *Spicer v. Norton*, 13 Barb. 543; *Tyler v. Stevens*, 11 Barb. 486.

(r) *Church v. Brown*, 21 N. Y. 316, considering with some care the earlier cases, and relying on *Union Bank v. Coster*, which was said not to have been overruled by *Brewster v. Silence*. *Hall v. Farmer* was said not to have settled anything, and *Brewster v. Silence* was doubted by at least one of the court.

(s) *Enos v. Thomas*, 4 How. Pr. 50, citing *Hunt v. Adams*; *Hough v. Gray*; *Lequeer v. Prosser*; *Hall v. Farmer*.

cient, some force being given to the expression "within charter."^(t) Where a mortgagor, in no way liable for the debts, agrees in the mortgage to insure the premises, this being beneficial to the promisee and prejudicial to the promisor, and expressed as part of the consideration of the mortgage, shows the consideration sufficiently.^(u)

§ 437. Another fact which has a determining effect upon the question as to the sufficiency of the statement of the consideration, is whether the latter, as shown by the memorandum, is past or future. If past, it is no consideration at all; but if future, it is good.

The following examples will show how far the courts will go in the endeavor to support the written promise by ascertaining from it, or from admissible suppletory evidence, a valid consideration. Thus the words used are "your account;" oral evidence to identify the account and show it to be future will be admitted.^(v) And it was said that the words of a guaranty are to be taken most strongly against the guarantor. And, generally, where the expression is ambiguous, oral evidence to show that a future consideration was meant, is ad-

(t) *Hazeltine v. Lareo*, 7 Cal. 33 (relying, however, upon the doubtful authority of *Legget v. Raymond and Manrow v. Durham*). A *dictum* open to criticism will be found in one of the earlier New York cases, in which it having been held that a promise to buy land with certain funds acknowledged to have been received, and a promise endorsed on the paper guaranteeing the performance of the first contract, cannot be joined in one action, as they are separate contracts; it was said that, if both contracts had not been under seal, the guaranty would have been within the Statute of Frauds as not expressing a consideration; the two promises were contemporaneous. *De Ridder v. Schermerhorn*, 10 Barb. 640, saying that *Lequeer v. Prosser* and *Enos v. Thomas* were overruled by *Hall v. Farmer*. The

following is an example of a case in which no consideration, either written or oral, appeared for the defendant's promise. C. promised by sealed writing to pay to B., in promissory notes of the defendant Roberts, for certain goods; C. gave a written order, directing the defendant to deliver the notes to B., and the defendant endorsed the order, "Accepted, Edward Roberts." The plaintiff is B.'s assignee. It was held that the memorandum was invalid for not showing a consideration under the Statute of Frauds; *Wilson v. Roberts*, 5 Bosw. 107.

(u) *Moog v. Strang*, 69 Ala. 102.

(v) *Walrath v. Thompson*, 4 Hill, 201. See *Weed v. Clarke*, 4 Sandf. 31, agreeing that the words "your account" might be sufficient identification, but criticizing the other observations made in the case.

missible.(w) A memorandum, "I will be responsible for the purchase of good iron from W. S. & Co. for H. C. D.," was held to apply to future sales.(x) In this, as in the following cases, the use of a verb in the past tense was not taken as showing a past transaction; so, where the guaranty was, "In consideration of your being in advance to," etc., it was said that an executed consideration was not necessarily imported.(y) Where, through use of the past tense in a memorandum, it is doubtful whether the consideration is past or future, the latter will be assumed *ut magis*, etc.(z) So a memorandum, "I do hereby agree to become security for Mr. R. G., now your traveller, in the sum of £500, for all money he may receive on your account," shows the consideration sufficiently, *i. e.*, the continuance of the traveller in the plaintiff's service.(a) Where P., the party answered for, had asked the plaintiffs to sell him goods, and they had refused, and the defendants the next day

(w) *Goldshede v. Swan*, 1 Exch. 159, citing cases.

(x) *Williams v. Ketchum*, 19 Wis. 231. The following guaranty, "Mr. Livie, having chartered your ship, etc., to bring a cargo, etc., and the same being landed to the charterer, and he having paid you one-half the freight, and given you his acceptance for the remaining half, etc., I engage to be accountable to you for the amount of said acceptance," etc., was held to show a consideration, viz., that the bill would not have been taken but for the guaranty; *Pace v. Marsh*, 1 Bingh. 216 (more fully given in 8 J. B. Moore, 61-2), relying upon *Boehm v. Campbell*.

(y) *Brooks v. Haigh* (Scacc. Cam.), 10 A. & Ell. 334; S. C. below, *id.* 319. See *Laing v. Lee*, Spencer, 339. So the following, "Become the security of Mr. De Billers to Mr. Lecat, for the sum of twenty-four piastres, which Mr. De Billers owes Mr. Lecat, and which I undertake to pay only in case Mr. De Billers shall fail to pay the same," was held to show the consideration to be

the order drawn by De Billers on the defendant; *Lecat v. Tavel*, 3 McCord, 158.

(z) *Steele v. Hoe*, 14 A. & Ell., N. S. 445, citing cases. See note to *Amer. ed.* *Gorrie v. Woodley*, 17 Ir. C. L. 221.

(a) *Ryde v. Curtis*, 8 Dow. & Ry. 62. See *Lysaght v. Walker*, 5 Bligh N. R. 25. So a memorandum in which the obligor binds himself "as security to you for J. C., late in the employ of, etc., for whatever you may entrust him with while in your employ," is sufficient as the inference is that J. C. was going from another employment to that of the plaintiff; *Newbery v. Armstrong*, 6 Bingh. 202; 4 C. & P., 60; *Moo. & Mal.* 389. So it was held that this note . . . "I undertake to pay to Mr. Robert Jarvis the sum of £6 4s. for a suit ordered by Daniel Page, S. W. Wilkins," was not a promissory note requiring a stamp, but a valid guaranty, showing by the word "ordered" what the consideration was; *Jarvis v. Wilkins*, 7 M. & W. 410.

telegraphed the latter, "I will be responsible for P.'s bill of goods ordered yesterday," it was held that the consideration was the reliance of the plaintiffs upon the defendant's promise, and that the latter engagement was that, if the plaintiffs would deliver the goods to P., the defendants would pay for them.(b) So the following: "I hereby guarantee to you the sum of, etc., in case Mr. P. should default in his capacity of agent and traveller to you."(c) In several instances a guaranty covering both a past and a future consideration has been sustained; as a guaranty of future drafts to be accepted and of past acceptance.(d) But in an English case, where the defendant undertook to secure the payment of any sums the plaintiff had advanced or might advance (see § 449 for a further consideration of the point of a past or future consideration); the court thought that they could not determine what the real consideration was, whether the past or the future advances. If for past advances, the request should be stated to make a binding agreement; if for future only, then the proof is not satisfactory, for the memorandum may include past advances as well. It is true that the consideration may be inferred, but the court must be able not merely to ascertain *a* consideration, but *the* consideration.(e) A memorandum of what "stock" a person "has had or may want" is good.(f)

(b) *Dunning v. Roberts*, 35 Barb. 468. For an example of a guaranty reciting a past matter being interpreted to be a promise in consideration of the thing being done which was recited as having been done, and held a sufficient memorandum, see *Butcher v. Stuart*, 11 M. & W. 873; and for a verb in the past tense, construed to refer to a future valid consideration.

(c) *Kennaway v. Treleavan*, 5 M. & W. 498, citing *Raikes v. Todd* and *Newberry v. Armstrong*. "I hereby guarantee the payment of, etc., the machine which — has purchased from you, etc.;" one judge thought the consideration, *i. e.*, future, good; the other thought the consideration past.

The former cited *Stadt v. Lill* and *Bateman v. Phillips*; *Wilson v. Hill*, 6 U. C. K. B., O. S. 9.

(d) *Hutton v. Padgett*, 26 Md. 228. See, also, *Staats v. Howlett*, 4 Denio, 566; *Littlejohn (Ex parte)*, 3 M. D. & De G. 186; *Dutchman v. Tooth*, 7 Scott, 710; 5 Bingh. N. C. 577. In *Staats v. Howlett* it was admitted that the portion of the contract relating to the executed contract was invalid, but it was held that this did not affect the rest.

(e) *Raikes v. Todd*, 8 A. & Ell. 855.

(f) *Gates v. McKee*, 3 Kern. 238. See *Russell v. Moseley*, 3 B. & B. 211. For examples of memoranda valid as showing a future consideration, see the cases in the note. *Nash v. Hart-*

§ 438. The reliance placed by the promisee upon the guaranty may have been shown in his forbearance of a claim. As where the defendant, a solicitor of a purchaser of land, wrote to B., solicitor for Bowers, the plaintiff, the vendor, as follows: "To save the purchaser from danger of entire destruction of his credit there appears to be no alternative but for me to undertake to settle the purchase. After long consideration I very reluctantly undertake to settle it within two months, if that will be satisfactory to your clients." It was held that the last eight words taken with what went before showed the consideration.^(g) A written promise to pay a certain sum if a third party does not pay it in instalments implies that the consideration is the forbearance of the promisee to proceed against such third person.^(h) A written promise to see a debt paid, one-half in six and the other in twelve months, shows a consideration of forbearance.⁽ⁱ⁾ Where the defendant signed the following: "Messrs. Hawes—" . . . "I forward you the bills drawn per J. T. A. upon and accepted by L. D., which I doubt not will meet due honor; but in default thereof I will see the same paid;" and J. T. A. and L. D. had owed the plaintiffs the precise amount named in the bills; it was held that the

Consideration of forbearance.

land, 2 Ir. Law Rep. 196; *Broom v. Batchelor*, 1 H. & N. 255; 25 L. J. Exch. 299; 4 W. R., 712; *Colbourn v. Dawson*, 10 C. B. 765; *Edwards v. Jevons*, 8 M. G. & S. 444; *Whitmore v. Johnson*, 1 Jeb. & Sym. 15. See *Haw. & O'Brien*, U. C. Dig. p. 358-9.
(g) *Powers v. Fowler*, 4 E. & Bl. 516.

not be sued for two years; *Coe v. Duffield*, 7 Moore, 255.

(h) *Joint v. Mostyn*, 2 Fox & Sm. 8. For other examples of forbearance appearing to be the consideration, see *Lent v. Padelford*, 10 Mass. 236; *Shortrede v. Cheek*, 1 A. & Ell. 58.

(i) *Nelson v. Sanborne*, 2 N. H. 414.

Where a letter showed an offer of forbearance upon a guaranty, and a guaranty was given as follows: "I hereby guaranty to you the payment of, etc., due from H. W. for articles which have been delivered to him," etc., so that this, my guaranty, shall not be put in force against me for two years, it was held that the memorandum was good, the letter and guaranty together being enough; *H. W. could*

One judge thought that the following was a sufficient statement of the consideration in a promissory note agreeing to pay "\$647.75 for this amount due him" (payee) "by Richard Tarrant," as implying a substitution of the defendant's credit for that of Tarrant, and an extinguishment of the demand against the latter; *Click v. McAfee*, 7 Porter, 65.

consideration of the defendant's promise, *i. e.*, the plaintiffs' forbearance of the debt of J. T. A. and L. D. till the bills became due did not appear in the memorandum; such a consideration was extremely probable; but there were other possible considerations, *e. g.*, the discounting of these bills, or giving a credit by the plaintiffs to J. T. A. and L. D. (j) An undertaking for the ultimate payment of the debt answered is insufficient, inasmuch as if forbearance is the consideration, it is too indefinitely stated. (k) Where the following was the memorandum relied on, the expression of the consideration of forbearance was considered insufficient; thus: Debt, £6-11-11. Costs, etc. We undertake to pay, etc., Cole the debt and full costs in this action, provided, on or before the first day of, etc., a sum of, etc., be not paid to him. (l) Where M. being indebted to the plaintiffs, the latter takes his promissory note endorsed by the defendants as follows: "We guarantee the payment of the within note," there is no consideration shown, for though the consideration may have been forbearance to press M., there might be other considerations. (m)

§ 439. In the note will be found some cases which are examples of memoranda sufficiently stating the consideration of the contract. (n) The examples of memoranda not properly

(j) *Hawes v. Armstrong*, 1 Scott, 669; 1 Bingh. (N. C.) 765; 1 Hodges, 174.

(k) *Smith v. Ives*, 15 Wend. 182.

(l) *Cole v. Dyer*, 1 Cr. & Jer. 462.

For other examples of memoranda not sufficiently showing a consideration of forbearance, see *Price v. Richardson*; 15 M. & W. 540; *Lang v. Nevill*, 6 Jur. 217; *Bennett v. Pratt*, 4 Denio, 276; *Slingerland v. Morse*, 7 Johns. 463.

(m) *Lock v. Reid*, 6 U. C. Q. B., O. S. 296, citing *Hawes v. Armstrong*.

A memorandum, "I hereby guarantee to pay the sum of ten dollars per week until the sum of \$300 due by," B. & H., "printers of the Irish Canadian shall be paid," shows no con-

sideration of forbearance, or of anything else, and is invalid under the Statute of Frauds; *Palsgrave v. Murphy*, 14 U. C. C. P. 154, citing *Clancy v. Piggott*.

"I hereby become responsible to you for the payment of £120 17s. 6d., etc. etc., in case John Cooper fails in paying the same," shows no consideration; that claimed was forbearance; *Evans v. Robinson*, 16 U. C. Q. B. 170, citing cases.

(n) *Coldham v. Showler*, 3 C. B. 312; 2 C. & K., 261; *Wynne v. Hughes*, 21 W. R. 628; *Redhead v. Cator*, 1 Stark. 14; *Caballero v. Slater*, 14 C. B. 300; *Benson v. Hippius*, 4 Bingh. 458; *Emmott v. Kearns*, 5 Bingh. N. C. 559;

stating the consideration have, for the most part, been grouped under the heads given above. The primary question is, whether the guaranty shows that the promise answered for was accepted in reliance upon it. The following are some cases in which a failure in this respect was fatal: "We, etc., take pleasure in recommending G. W. S. to Deutsch & Co.;" "We, etc., agree to become responsible for \$350 to said Deutsch & Co., to be forthcoming, etc., after the delivery of the work;" parol evidence to show that Deutsch & Co. were printing a book for G. W. S., an author, was inadmissible.^(o) Where the defendant bought for himself, and then bought for A., and the invoices thus, "A. (guaranteed by J. L., the defendant) were sent to the defendant, who, upon A.'s not paying, sent the goods to the plaintiffs, saying that he would guarantee what A. had got, except the last lot, and this because A. no longer sent his goods to the defendant to sell," it was held that a request by the defendant that the plaintiff should make the later sale to A., does not follow from a request to make the first sale, and that oral evidence was not admissible to show that the second sale was made upon such a request.^(p) As has been seen, the fact of the contemporaneity of a guaranty and the agreement guaranteed is generally regarded as indicating a common consideration for the two engagements. But where the guaranty is subsequent to the original contract, the consideration of the latter cannot support the former.^(q) Endorsing on a note a guaranty

Miscellaneous examples of memoranda showing sufficiently or insufficiently the consideration of the contract.

Fellows v. Prentiss, 2 Denio, 512; *Grant v. Hotchkiss*, 26 Barb. 66; *Eastman v. Bennett*, 6 Wis. 241.

(o) *Deutsch v. Bond*, 46 Md. 168; see § 437.

(p) *Lyon v. Lamb*, Fell on Guar., Appendix III. p. 351. The following, "I hereby engage to pay you on Mr. Thomas Lamb's account £50 at the expiration of the usual credit, on the event of any deficiency on his part so to do," was held not to show the consideration. *Atkinson v. Carter*, 2 Chitt. 403. So the following: "I hereby

agree to pay you the rent, etc., of the house hired of you by, etc., in case he fails." *Newcomb v. Clark*, 1 Denio, 228.

(q) *Gillighan v. Boardman*, 29 Me. 79; *Crofts v. Feugo*, 6 Ir. Jur. 160; *Clark v. Small*, 6 Yerg. 423; *Rigby v. Norwood*, 34 Ala. 132; *Pope v. Fort*, 2 McMull. 62; *M'Coskey v. Deming*, 3 Blackf. 146. See the New York cases, *supra*. The following are some examples of memoranda showing a past consideration, if any, thus: "As you have a claim against my brother . . .

that it is not outlawed under the laws of the state, shows no consideration to be invalid.(r) Where one consideration is alleged, and another appears in the memorandum, oral evidence to show that the former is the true one, is not admissible, as thereby there would be a variance.(s) But it has been said that the point that a consideration is misdescribed in the declaration as past, is not important, the writing showing a future one.(t) For examples of memoranda generally insufficient as not showing the consideration, see the cases in the note.(u)

I hereby undertake to pay you." *James v. Williams*, 3 Nev. & Man. 200 (and note); 5 B. & Adol., 1110; 2 Dowl., 481, distinguishing *Coe v. Duffield*. And so a promise to indemnify one for becoming surety not made at the latter's request, and subsequent to the contract of suretyship; *Carroll v. Nixon*, 2 Miles, 432. A written promise to procure a guaranty which described the latter as being on a past consideration would, if broken, entitle the promisee only to nominal damages for the breach; *Bushell v. Beavan*, 1 Bingh. N. C. 122. For further examples of memoranda showing a past consideration, see the following cases: *Weed v. Clarke*, 4 Sandf. 38; *Bennett v. Pratt*, 4 Denio, 275; *Morley v. Boothby*, 3 Bing. 112; *Bewley v. Whiteford*, *Hayes*, Exch. 361 (citing and considering a number of cases); *Whitmore v. Johnson*, 1 Jebb. & Sy. 15; *Allnutt v. Ashenden*, 5 M. & G. 392; *Ellis v. Levy*, 1 Scott, 669 (n.); 1 Bingh. N. C. 767 (n.); *Bell v. Welch*, 9 C. B. 167; 19 L. J. C. P., 184; *Wilson v. Hill*, 6 U. C. K. B., O. S. 9.

(r) *Clark v. Hampton*, 4 Th. & Cook, 75; 1 Hun, 612.

(s) *Gull v. Lindsay*, 4 Exch. 51. As to stating the consideration in the pleadings, see *Clancy v. Piggott*, 4 N. & M. 502; 2 A. & Ell. 473

(t) *Coe v. Duffield*, 7 Moore, 255.

(u) *Pope v. Fort*, 2 McMull. 62; *Phillips v. Bateman*, 16 East, 363, 371; *Lees v. Whitcomb*, 5 Bingh. 34; 3 C. & P. 289; 2 M. & P., 86; *French v. French*, 2 M. & G. 644; 2 Sc. N. R., 124; *Bentham v. Cooper*, 5 M. & W. 628; *Jeffery v. Stephens*, 6 Jur., N. S. 947; *Hall v. Butler*, 1 Eq. Ca. Abr. 20; *Parkins v. Moravia*, 1 C. & P. 376; *Parker v. Smith*, 1 Collyer, Ch. 623; *Humphreys v. Green*, 10 Q. B. D. 154; 48 L. T. Rep., N. S. 60; *May v. Thomson*, 20 Ch. Div. 705; 51 L. J. Ch., 917; 47 L. T., 295; *Pentreguine Fuel Co. (Pegg's claim)*, *Ex parte Acramon*; 4 De G. F. & J., 541; 7 L. T., N. S. 84. See *Brunker's C. L. Dig. (Irish)* p. 1098 *et seq.* See *Rob. & Jos. U. C. Dig.* 1632. *Crofts v. Feugo*, 6 Ir. Jur. 160; *Walker v. O'Reilly*, 7 U. C. L. J., O. S. 300; *Aldridge v. Turner*, 1 G. & John. 429; *Bland v. Eaton*, 1 Can. Law Times, 201; 6 Ont. App., 73; *Marks v. Scott*, 2 Kerr, 640; *Segars v. Segars*, 71 Me. 524; *Waterman v. Meigs*, 4 Cush. 499; *Hazard v. Day*, 14 Allen, 494; *Carr v. Passaic Co.*, 4 C. E. Green, 425; 7 C. E. Green, 85; *Johnson v. Buck*, 35 N. J. Law, 338; *Calkins v. Falk*, 1 Abb. App. Dec. 291; *Henry v. Colby*, 3 Brewst. 175; *Soles v. Hickman*, 20 Pa. St. 180; *Meadows v. Meadows*, 3 McCord, 458; *Blair v. Snodgrass*, 1 Sneed, 1; *Wright*

In the following note will be found reference to examples of sufficient memoranda.(v)

- v. Cobb*, 5 Sneed, 143; *Buck v. Pickwell*, 27 Vt. 158. See *Smith's Law of Master and Servant*, p. 311 *et seq.*
- (v.) *Ogilvie v. Foljambe*, 3 Mer. 53; *Oldershaw v. King*, 2 H. & N. 521; reversing S. C., *id.* 399; *Evans v. Prothero*, 21 L. J. Ch. 772; 20 *id.*, 448; *Peate v. Dickens*, 1 Cr. M. & R. 431; 5 Tyr., 124; 3 Dowl., 177; *Hemming v. Perry*, 2 M. & P. 384. See *Fisher's C. L. Dig.* p. 4214 *et seq.* *Carrigy v. Brock*, 5 Ir. Rep. C. L. 501; *Sadleir v. Burke*, 1 Leg. Rep. Irish, 282; *Mallock v. Pinkey*, 9 Grant, 554. See *Rob. & Jos. U. C. Dig.* 1632. *Dodge v. Van Lear*, 5 Cranch, C. C. 278; *Clark v. Burnham*, 2 Story, 11; *Hooper v. Laney*, 39 Ala. 301; *Vassault v. Edwards*, 43 Cal. 463; *Estes v. Furlong*, 59 Ill. 300; *Wills v. Ross*, 77 Ind. 1; *Wesley v. Walker*, 26 W. R. 368; *Drury v. Young*, 58 Md. 547; *Bird v. Richardson*, 8 Pick. 252; *Howe v. Dewing*, 2 Gray, 476; *Ayres v. Galup*, 44 Mich. 13; *Westervelt v. Matheson*, 1 Hoff. Ch. 37; *White v. Motley*, 4 Baxt. 544; *Winfield v. Potter*, 10 Bosw. 230; 24 How. Pr., 446; *Colt v. Selden*, 5 Watts, 528; *Cadwalader v. App*, 81 Pa. St. 210; *Ives v. Hazard*, 4 R. I. 14; *Hatcher v. Hatcher*, 1 McMullin's Eq. 311; *Cosack v. Descou-dres*, 1 McCord, 425; *Bowles v. Woodson*, 6 Gratt. 78; *Johnson v. Noonan*, 16 Wis. 695.

